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H.R. 5337, THE REFORM OF NATIONAL SECURITY REVIEWS OF FOREIGN DIRECT INVESTMENTS ACT

HEARING

BEFORE THE

SUBCOMMITTEE ON
DOMESTIC AND INTERNATIONAL
MONETARY POLICY, TRADE, AND TECHNOLOGY

OF THE

COMMITTEE ON FINANCIAL SERVICES

U.S. HOUSE OF REPRESENTATIVES

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H.R. 5337, THE REFORM OF NATIONAL SECURITY REVIEWS OF FOREIGN DIRECT INVESTMENTS ACT

Wednesday, May 17, 2006

U.S. HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON DOMESTIC AND
INTERNATIONAL MONETARY POLICY,
TRADE, AND TECHNOLOGY,
COMMITTEE ON FINANCIAL SERVICES,
Washington, D.C.

The subcommittee met, pursuant to notice, at 2:00 p.m., in room 2128, Rayburn House Office Building, Hon. Judy Biggert [vice chairwoman of the subcommittee] presiding.

Present: Representatives Pryce, Biggert, Manzullo, Fossella, Campbell, Maloney, Lee, Sherman, and Crowley.

Mrs. BIGGERT. [presiding] The Subcommittee on Domestic and International Monetary Policy, Trade, and Technology will come to order. Thank you all for being here. I will recognize myself for an opening statement.

I would like to welcome everyone here to this hearing on H.R. 5337, the Reform of National Security Reviews of Foreign Direct Investments Act. I want to thank Chairwoman Pryce for holding this hearing, and thank Majority Whip Blunt, Chairwoman Pryce, Ranking Member Maloney and Mr. Crowley for introducing the bill that provides commonsense reform of the CFIUS process.

I am honored to be an original cosponsor of this bill, which is designed to strengthen national security while promoting foreign investment and the creation and maintenance of jobs.

In order to enhance our members' understanding of the current CFIUS process and determine how best to reform it, this subcommittee has already held two hearings on this issue. In those other hearings, one recurring theme was the need to reform the so-called "Byrd rule" which triggers whether transactions go to investigation. This legislation now requires the investigation of any transaction that is foreign-government-controlled. It also requires investigation where the threat to national and homeland security has not been mitigated during the 30-day review period.

The subcommittee also has heard how important it is for senior officials within an Administration to be aware of transactions moving through the CFIUS process. This bill makes it clear that an investigation is not considered complete until the findings and reports are approved by a majority vote of the CFIUS members. Fol-

lowing that vote, the reports must be signed by the Chair and Vice Chair of CFIUS.

Under this legislation, sitting members of CFIUS will be accountable and responsible. Language in the bill prohibits the Chair and Vice Chair from delegating the signing of these reports to any person other than the Deputy Secretary of those agencies.

Currently, when a transaction moves through the CFIUS process, there is a lead agency assigned to negotiate assurance agreements and mitigate any security concerns. This legislation strengthens that process by increasing the enforcement responsibilities of the lead agency.

In our previous hearings, Chairwoman Sue Kelly of the Oversight Subcommittee brought to our attention the need for codifying the process by which CFIUS checks in with the Financial Crimes Enforcement Network and the Office of Foreign Assets Control to ensure that a transaction isn't just being funded with terrorist financing. This legislation includes a DNI directive to do just that.

As for reporting to Congress, this legislation would require that CFIUS notify majority and minority leaders of the Senate, the Speaker and Minority Leader of the House, and the Chair and Ranking Member of the House and Senate of any committee with jurisdiction over any aspect of the covered transaction when an investigation has been completed.

Any Senator or Member of Congress can receive a classified CFIUS briefing on a transaction. The bill requires a semiannual report to Congress on all reviews and investigations conducted during the previous 6 months.

CFIUS was designed in our pre-9/11 world, and in this post-9/11 environment, national and homeland security have never been more important. Under this legislation, the Vice Chair position is created and is designated by the Secretary of Homeland Security.

And finally, this bill authorizes increased funding levels, and it gives CFIUS flexibility in the definition of critical infrastructure which is so important in a world of rapidly changing technologies.

I look forward to hearing from our witnesses today on how this legislation reforms the process and what effects the changes will have on foreign investment and national and homeland security.

And with that, I am happy to recognize Ranking Member Maloney for her opening statement.

Mrs. MALONEY. I would like to thank Acting Chairwoman Judy Biggert for holding this hearing, and I welcome all of the witnesses. I am very interested to hear what you have to say today about H.R. 5337, bipartisan legislation we have introduced to reform and strengthen the CFIUS process.

From my perspective, this legislation is a commonsense approach that makes the CFIUS process more transparent and accountable. While protecting our national security, it strengthens the process without delaying or politicizing the decisions.

Over the past several months, I have been pleased that this committee has taken a balanced and deliberative approach to drafting substantive bipartisan legislation, and I am very pleased that H.R. 5337 builds on the legislation, H.R. 4915, that I introduced in March when our committee held our first hearing on CFIUS.

Both bills are based upon recommendations made by the Government Accountability Office before the Dubai Ports fiasco. Specifically, H.R. 5337 will ensure that there will be a full review of any government-owned or -controlled company by mandating an additional 45-day review of any foreign government company going through the CFIUS process.

And we expand and add to the role of the Director of National Intelligence. Our goal is to have a more timely and more completely reviewed process, and we require a formal analysis from the DNI.

We increase the role of the Department of Homeland Security to really reflect 9/11 realities by designating the Secretary as the Vice Chair of the process, and we ensure proper tracking of mitigation agreements and withdrawals. This will make companies unable to just fly off the radar screen.

There has to be an agreement between the Chair and the Vice Chair about how they are removed from the process and when they go back into the process. And we create the board and provide funding solely for the CFIUS process. We elevate certain decisions to the Deputy Secretary level and we increase the reporting requirements to Congress, striking, we hope, a better balance between exerting proper oversight while making sure that we do not politicize the process.

Again, I thank the chairwoman for holding today's hearing and I look forward to hearing from our witnesses. Thank you.

Mrs. BIGGERT. Are there any other opening statements?

The gentleman from New York is recognized for 3 minutes.

Mr. CROWLEY. Thank you, Madam Chairwoman.

First, I would like to thank the Chair, particularly the ranking member, my friend and colleague from New York, Mrs. Maloney of the subcommittee, not only for calling this hearing today on H.R. 5337, but also for their hard work in helping to craft this bipartisan bill along with myself and Representative Roy Blunt. With the assistance of Chairman Oxley and Ranking Member Frank, we introduced H.R. 5337, the bill that we are discussing here today.

I believe that this bill represents a commonsense solution to the concerns raised earlier this year regarding the CFIUS process. As we all know now, the CFIUS Committee on Foreign Investments in the United States was a little-known committee, operating under the Treasury Department, dealing with accruals of acquisitions of U.S. companies by foreign purchasers. This winter's controversy over the Dubai Ports World's deal brought this committee and the CFIUS process into daylight.

I think most of us can agree that the actions taken by the Administration both leading up to and after the Dubai situation caused serious concern about the process and the secrecy that surrounded that process. Stating that we, the authors of H.R. 5337, also firmly believe that the CFIUS process has generally worked well and that while some legislative changes are necessary, the process by which foreign investors can purchase U.S. companies should not be completely derailed by this one case or by the select action of this Administration.

The hearing today focuses on our bill, the Reform of National Security Reviews of Foreign Direct Investments Act, that will reform

the CFIUS process while ensuring that our national security concerns are met and, at the same time, will not stop direct foreign investment into the United States.

H.R. 5337 codifies the Committee on Foreign Investment into law and mandates that it ensures the protection of America's national security. The bill mandates regular reporting to Congress, timely, but after-the-fact reporting so that we are knowledgeable in our oversight capabilities, but not involved in transactions' specific decisionmaking.

The bill also allows for a clean process for mitigation agreements to be monitored and enforced. This bill cleans up some of the problems of CFIUS, while not radically altering a committee that has, by and large, worked well for decades.

I look forward to the testimony of our witnesses today.

I thank the chairwoman for yielding time for my opening statement, and I yield back the balance of my time.

Mrs. BIGGERT. Thank you. Does the gentlelady from California have a statement?

Ms. LEE. Thank you very much.

Mrs. BIGGERT. You are recognized for 3 minutes.

Ms. LEE. Thank you very much, Madam Chairwoman. I want to thank you and our ranking member for holding this very important hearing and to thank our witnesses for being here today.

The Dubai Ports deal really revealed a huge gap in Congressional oversight of the actions of this Administration. As elected Representatives, we have a very critical role to play in our system's checks and balances, but ultimately without access to information, Congress really can't fulfill its constitutional obligation. And unfortunately, I must say that this seems to be the way that this Administration really likes to play things around here, from WMD's to faulty intelligence to NSA wiretapping, we really have been, quite frankly, left out in the cold.

So I appreciate the fact that this subcommittee is willing to conduct its oversight role in this instance, and I hope that this is a sign of things to come.

My concerns with the CFIUS process revolve around this critical issue, of course, of oversight and I look forward to hearing from all of you with regard to how H.R. 5337 addresses the question of oversight.

Thank you and I yield the balance of my time.

Mrs. BIGGERT. Does the gentleman from Illinois have an opening statement?

Mr. MANZULLO. Yes, I do. Thank you.

Mrs. BIGGERT. Three minutes.

Mr. MANZULLO. Thank you.

I would like to say welcome and thank you to our witnesses for appearing today as we continue our examination of CFIUS in terms of scope and extent of needed reforms to this critical process.

It is my great pleasure to be an original cosponsor of the Reform of National Security Reviews of Foreign Direct Investments Act, H.R. 5337, introduced by Majority Whip Blunt, Chairwoman Pryce, Ranking Member Maloney and Congressman Joe Crowley. I now join this legislation because I firmly believe that it strikes the right balance between the need to encourage robust and welcoming envi-

ronment for foreign investors and obligation, human assets, and resources.

Our Congressional district has had several manufacturing facilities that have been saved by foreign direct investment from Germany, from Italy, and from Israel. Even a Chinese enterprise, which is remarkable, bought a manufacturing facility in our Congressional district that nobody else wanted and there was no other financing available and created new jobs. And also Great Britain, Cadbury Schweppes bought the doughnut factory in our district. It is the largest known sugar gum factory in the world.

So, Madam Chairwoman, we are very much interested in maintaining full foreign direct investments in our State of Illinois, and I look forward to your testimony. Thank you.

Mrs. BIGGERT. Thank you;

At this time I would like to introduce our first panel of witnesses. First, we have Assistant Secretary Clay Lowery. Mr. Lowery advises the Secretary on international economic policy. Prior to his work with the Treasury Department, he worked as the Director of International Finance at the National Security Council. Welcome.

Assistant Secretary for Policy for the Department of Homeland Security, Stewart Baker, is next in line. Mr. Baker also serves on the President's Export Council Subcommittee on Export Administration and the Commerce Department's Industry Trade Advisory Committee. Thank you for coming.

Peter Flory, the Assistant Secretary of Defense—I have skipped over—for International Security Policy. Mr. Flory serves as the principal advisor to the Secretary of Defense on issues that relate to the development of security cooperation strategies with nations of Europe, Eurasia, and the North Atlantic Treaty Organizations.

And then back to Mr. Flory's right is Alice Fisher, who is the Assistant Attorney General for the Criminal Division, U.S. Department of Justice. Ms. Fisher supervises the enforcement of Federal criminal laws and policy. In addition, she supervises the prosecutors in the division on matters of national security and international affairs. Welcome.

And we welcome all the witnesses to the hearing today and recognize a 5-minute summary of their testimony.

We will start on the left with Mr. Lowery.

STATEMENT OF THE HONORABLE CLAY LOWERY, ASSISTANT SECRETARY FOR INTERNATIONAL AFFAIRS, U.S. DEPARTMENT OF THE TREASURY

Mr. LOWERY. Madam Chairwoman, Ranking Member Maloney, Representatives Lee and Manzullo, I appreciate the opportunity to appear before you today on behalf of the Administration, the Department of the Treasury, and the Committee on Foreign Investments in the United States.

While we do not have a formal Administration position at this time on any pending legislation, I would like to lay out the key principles that would guide us as we work with the Congress to update the CFIUS process.

We believe that reform should address two broad principles: U.S. national security imperatives in the post-9/11 environment and the need to continue investment in the United States that creates good

jobs for American workers. In the context of these broad principles, we have listened carefully to the concerns of Congress, and I would like to highlight five specific areas that we believe address these concerns—most of these concerns and issues that you have raised in our opening statements.

First, the Administration shares the view that we need to improve our communication with Congress to help Congress meet its oversight responsibilities. We are already taking steps to improve this process. For instance, we are now promptly notifying Congress of every transaction upon its completion, and we are committed to conducting quarterly briefings for any concern on CFIUS matters.

The Administration is also actively preparing a 2006 quadrennial report on amendment. We regret a quadrennial report has not been prepared since 1994, and the Administration will issue the 2006 report in a timely and thorough manner.

We are also open to other suggestions on how to foster better communication.

While reforms in the CFIUS process should advance our shared goal of improved communication, we must always keep in mind that they should ensure that proprietary information will be adequately protected so that companies are encouraged to file with CFIUS; they should preserve the integrity of the Executive Branch's decisionmaking process; and they should avoid possible exposure to politicization of intelligence and security reviews. We are confident that CFIUS can provide Congress with the information it requires to fulfill its oversight role while respecting these principles.

Second, we should look at ways to increase Congress's confidence in the process of enhancing accountability in terms of CFIUS decisions and in terms of monitoring mitigation agreements. The Administration is committed to ensuring that senior Senate-confirmed officials play an integral role in every transaction presented to the committee; we have already taken steps in this direction.

For instance, I know that CFIUS agencies are briefing transactions at the highest levels in their respective agencies. However, requiring the Presidential determination or Cabinet-level certification with respect to every transaction would introduce unnecessary delays and divert high-level attention from the transactions that raise possible national security issues. It is these transactions that could pose security risks where we should be focusing our most senior officials' enhanced detection.

At the same time, CFIUS process agencies feel the need to put in place mitigation agreements to implement security measures that vary in scope and purpose according to particular national security concerns raised by the specific transaction. Monitoring parties' adherence to mitigation agreements after the conclusion of the CFIUS process is an important part of protecting the national security. The Administration, therefore, supports reforms that reinforce the authority and provide resources for agencies to negotiate mitigation agreements to improve existing enforcement practices.

Third, members of this committee know very well that we must also continue to emphasize the importance of preserving the attractiveness of the United States to overseas investment. Foreign direct investment is critical to the U.S. economy. Majority-owned

U.S. affiliates of foreign companies employ over 5 million Americans. These jobs, on average, are higher-paid, and roughly 40 percent of these jobs are in the manufacturing sector, which is roughly 4 times the national average. If the foreign companies were to reduce their spending in the United States as a result of perceptions that the United States was less welcoming of FDI, lower investment would cost American workers good jobs, reduce innovation, and lower the growth of the U.S. economy.

Fourth, the Administration supports efforts to update CFIUS to reflect the post-9/11 security environment. The committee should continue to consider a broad range of national security issues when reviewing transactions. Two factors that should always be taken into account in CFIUS assessments are the nature of the acquiring entity and the nature of the assets to be acquired. The Administration supports requirements for CFIUS to consider ultimate ownership of the acquirer in the possible foreign acquisition of critical infrastructure or any other sensitive assets when reviewing any transaction.

Let me be clear. There is a misperception about how CFIUS operates. The initial 30-day period is a thorough investigation in which a comprehensive threat vulnerability assessment is conducted by professionals across the agencies. If there are national security concerns raised that cannot be addressed during that time frame, extended investigation becomes necessary. However, requiring expanded investigations in which no national security concerns are present would divert resources and thereby diminish feasibility to protect national security.

Fifth, the Administration also believes that CFIUS can carry out its duties more effectively by strengthening the role of the intelligence community in the CFIUS process. We have taken steps in this area by formalizing the role of the Office of the DNI which is participating in CFIUS meetings, examining every transaction notified to the committee, and provides broad and comprehensive threat assessments through the National Intelligence Council. The DNI does not, and should not, vote on CFIUS matters because the role is to provide intelligence support and not to make policy judgments. The DNI has already contributed greatly to the CFIUS process through threat assessment.

Mrs. BIGGERT. Mr. Lowery, if you can sum up.

Mr. LOWERY. Formalizing the process is vital to our national security interests.

Madam Chairwoman, I would like to reiterate in closing that the Administration supports reforms to the CFIUS process and will continue to work with Congress toward that end.

Thank you.

[The prepared statement of Mr. Lowery can be found on page 49 of the appendix.]

Mrs. BIGGERT. Thank you.

Before I forget, without objection, all of your written statements will be made part of the record.

Mr. Baker.

STATEMENT OF THE HONORABLE STEWART A. BAKER, ASSISTANT SECRETARY FOR POLICY, PLANNING AND INTERNATIONAL AFFAIRS, U.S. DEPARTMENT OF HOMELAND SECURITY

Mr. BAKER. Thank you, Madam Chairwoman.

Mrs. BIGGERT. If you could turn on your microphone and pull it a little bit closer.

Mr. BAKER. Thank you, Madam Chairwoman, Ranking Member Maloney, distinguished members of the committee, I appreciate being here, having an opportunity to give an explanation of the Department of Homeland Security's role in CFIUS.

We are the newest member of CFIUS. We joined in March of 2003. Since then, we have participated in about 170 transactions, and I think there are three or four things that you can say about the role that we have carved out for ourselves.

First, we have taken the lead in addressing critical infrastructure, national security, and homeland security issues because that is one of our fundamental requirements as a department, to guarantee the safety of the critical infrastructure.

But I think it is also fair to say that having been formed as a result of September 11th and the attacks on that day, we have had to be rather creative about the kinds of national security, homeland security concerns that we have tried to address, and that has led us to have a very broad view of what national security and homeland security requires in these circumstances.

We have often used the authority to enter into mitigation or national security agreements. I think we have entered into more than 30 already in the few years that we have been part of the CFIUS process, and I think it is also fair to say that we have been pretty aggressive in defining the kinds of threats that require some sort of action on the part of CFIUS. And while I think our forward-leaning stance on security issues sometimes gives rise to debate in CFIUS, I hope and believe that the other members of CFIUS believe that it has, in the end, contributed to better decisionmaking on CFIUS's part.

Just in case it is not clear from these remarks, the Department has made CFIUS one of its highest priorities. I became Assistant Secretary in the fall of last year and just about the first staff person that I went out to recruit was somebody to head up our CFIUS office. We have plans to substantially expand that office and continue to be very aggressive both in entering into agreements and in enforcing them.

With respect to CFIUS reform, very briefly three points. First, I really want to thank this subcommittee for its engagement on this issue. You have produced a very responsible and thoughtful mission to the debate. We appreciate the opportunity to talk about it here today.

Second, I fully subscribe to what Secretary Lowery said about CFIUS reform. We take it very seriously, and we want to make sure that it is handled in a responsible and careful way.

And finally, we are really delighted to be part of this debate and we look forward to the opportunity to talk with the committee members and staff about ways to improve the bill.

Thank you.

[The prepared statement of Mr. Baker can be found on page 36 of the appendix.]

Mrs. BIGGERT. Thank you very much.

And Ms. Fisher, you are recognized for 5 minutes.

STATEMENT OF THE HONORABLE ALICE S. FISHER, ASSISTANT ATTORNEY GENERAL, CRIMINAL DIVISION, U.S. DEPARTMENT OF JUSTICE

Ms. FISHER. Thank you, Madam Chairwoman, Ranking Member Maloney, and members of the committee. Thank you for inviting me here today on behalf of the Department of Justice, and thank you for your efforts to reform the CFIUS process.

We appreciate all of the efforts that will ensure the confidence of both Congress and the public in the CFIUS process. Of course, the number one priority of the Department of Justice is ensuring national security and protecting national security; and that means to ensure public safety, both foreign—against threats foreign and domestic; and the Department is keenly aware of its role and its responsibilities under Exon-Florio as a member of the CFIUS process, and we work hard to meet these responsibilities.

We are able to draw upon our resources throughout the Department, and have a lot of engagement with the FBI and other divisions throughout the Department. For example, the FBI will call on its resources for analysis in investigation, using all of its techniques to the counterintelligence section, the counterterrorism division, and the cyber division within the FBI and all of the expertise that they bring to bear with regard to these national security issues and the communications and cyber issues.

In addition, we have experts within the Department in our Computer Crime Section on communications and infrastructure protection. We have a Counterespionage Section and a Counterterrorism Section also within the Department that will bring unique expertise to this process, and routinely does bring unique expertise to this process.

We will call on other sections—whether it is the Antitrust Division, the Office of Intelligence and Policy Review—but the point is that whatever expertise we need, whatever information we need, we have that resource available within the Department, and we make sure that we collect that information and discuss it and bring it to the CFIUS committee to discuss as a whole.

We also review the DNI threat assessments and vulnerability analyses that are submitted by the DNI, and if we have additional questions, we will go back and engage in that process as well.

By bringing all these resources to bear, the Department of Justice has maximized its ability to participate in the effective implementation of Exon-Florio.

And I would also like to comment on the importance of the security agreements that have been negotiated, and I know it is part of the legislation that you have been considering. We believe that the security agreements and the mitigation agreements are a very important part of the CFIUS process, and we look at them on a case-by-case basis. But the fact that we have that available, the fact that they are enforceable through our contract remedies and remedies in the agreements themselves—I know that you all are

considering other things with regard to these agreements, and we do find that to be a very critical tool in the CFIUS process.

We have also engaged using those agreements and audits, or third-party audits, on-site visits, and engage with the companies that sign up with these agreements. So I appreciate your deliberations and your consideration with regard to those agreements.

We work with the other agencies through the CFIUS process, and where necessary, we enjoy a good debate with regard to the national security interest.

At the end of the day, that is what we are there to protect, and we appreciate the opportunity to discuss that here with you today. Thank you.

[The prepared statement of Ms. Fisher can be found on page 38 of the appendix.]

Mr. CAMPBELL. [presiding] Thank you, Ms. Fisher.

Mr. Flory.

STATEMENT OF THE HONORABLE PETER C.W. FLORY, ASSISTANT SECRETARY FOR INTERNATIONAL SECURITY POLICY, U.S. DEPARTMENT OF DEFENSE

Mr. FLORY. Thank you, Mr. Chairman, Ms. Maloney, and members of the committee. I appreciate the opportunity to appear before you today.

Assistant Secretary Lowery and my colleagues have laid out the principles that will guide our CFIUS reform and our review of the legislation proposed by the committee. The Defense Department shares these principles, and like the other agencies here today, we support reform of the CFIUS process.

I would like to briefly discuss the Department of Defense's role as a member of CFIUS, as well as a few improvements we have tried to make in the process within the Department as part of the broader interagency effort to look at this process and find ways to make it better.

As a member of CFIUS, the Department of Defense weighs a number of factors when it considers foreign acquisition of a U.S. company. First and foremost, our objective in this process is to be sure that the proposed transaction does not pose risks to U.S. national security interest. To do this, the Department reviews several aspects of the transaction, including the importance of the firm being acquired to the U.S. defense industrial base, for example, whether it is a sole-source supplier.

We also look at the question of whether the firm to be acquired has state-of-the-art or other military-critical technologies. We ask whether the company to be acquired is part of the critical infrastructure that the Defense Department relies upon to accomplish its mission. We ask, is the acquiring company involved in sensitive technology or weapons of mass destruction and their delivery systems?

These are not all of the questions we might ask, but these are some of the questions we look at in the Department of Defense, and the bottom line is, if we find issues, we ask ourselves if any potential national security concerns posed by the transaction can be addressed by allocation of risk mitigation measures under the Depart-

ment's own regulations or through other aspects of the CFIUS process negotiations with the parties.

Recently we have done a few things to incorporate some of the lessons learned from recent events. These have focused on several areas, one of which was a topic that members of the committee have mentioned—and we agree with the need for action here—which is to ensure accountability in the CFIUS process at the senior leadership levels within the Defense Department and across the management of our reviewing organizations.

Another step we have taken is to add the Assistant Secretary for Homeland Defense and the Chairman of the Joint Chiefs of Staff to our formal list of CFIUS case reviewers.

We also bring in additional organizations and experts to augment the standard Defense Department review organizations. Our standard list, I should point out, is 19 different offices and organizations within the Department, but there are cases where we feel the need to bring in somebody else; and when we feel that need, we do so.

To continue strengthening our internal CFIUS process, we are clarifying the authorities and detailing responsibilities of the Department's CFIUS reviewing organizations in a DOD instruction. We think this is particularly important for us, given the size of the Defense Department and the number of reviewing organizations. As I just mentioned, there are 19 of them that play a role, and I believe this effort would be helpful in ensuring that we are allocating personnel with the appropriate programmatic, technical, operational, regional, and other expertise to the review of these transactions.

Again, we are also working actively with other CFIUS member agencies represented here as well as others to develop and implement further improvements in the interagency review process. One important part of this has been the increased frequency of interactions at all levels amongst the CFIUS committee members.

Mr. Chairman, the Department of Defense believes that the CFIUS process is working effectively to balance the important need for foreign investment in the United States with the critical need to protect our national security. This concludes my formal statement.

I would be happy to answer any questions that you may have.

[The prepared statement of Mr. Flory can be found on page 42 of the appendix.]

Mr. CAMPBELL. Thank you, Mr. Flory. And thank you, panel.

Mr. Manzullo, do you have any questions for the panel?

Mr. MANZULLO. I do. Thank you very much.

I am concerned about several aspects of what CFIUS does. But let me just share with you—with regard to follow-up, you had mentioned something about that. Do reports exist on follow-up for compliance with CFIUS in particular situations?

Ms. FISHER. I am sorry. Excuse me? Reports?

Mr. MANZULLO. With regard to follow-up, to making evaluation and monitoring of the requirements that you may set forth, do reports exist?

Ms. FISHER. Well, we have certainly engaged from time to time with companies on audits, on-site audits, third-party; we have in-

sisted that companies hire third-party auditors to come in and audit pursuant to the agreement.

So we have—the agreements themselves are written. We have audits that we have done from time to time. Most regularly we might—if something comes to our attention on the monitor and it is unfortunate, we are concerned about, we will engage directly with the company to try to get them to fix anything that we have concerns about.

Mr. MANZULLO. Have there ever been any sanctions for noncompliance?

Ms. FISHER. To date, I am not aware of any, certainly not during my period of time at the Department of Justice, where we have put a company in breach of a particular security agreement.

The other members of the panel might have more information on that. I know that there are certain remedies within these agreements that we can enforce as part of the contract itself, and in addition, I know that this committee is considering other things to enhance and improve our efforts to remedy mitigation agreements.

Mr. MANZULLO. The reason I ask that is, the present law requires reporting to Congress, and I just want to be very blunt with you—CFIUS, I asked them to come to my office to have a briefing. And these are rather junior people involved in the agencies, and they also said that—well, this is top secret, it is classified, and I heard nothing new. I mean, I received absolutely nothing in the briefing that CFIUS gave to Congress.

I also expected that more high-level administrative officials would have been involved in this. At what level do you comprise your review of the different—19 different agencies that are involved?

Mr. LOWERY. I am not sure about the particular briefing that you received. In terms of—

Mr. MANZULLO. I will tell you, it was the one on IBM.

Mr. LOWERY. Okay. Well, I wasn't in my job at that time, but the way we are viewing—one, we believe that it is very important for us to increase our communication with Congress. If there have been mistakes—

Mr. MANZULLO. I understand. My question is, at what level in each agency do you assign people to work on the CFIUS?

Mr. LOWERY. Basically, each agency does things differently, but what I can say, what goes on in the Treasury—and I think I can speak for all agencies here—all transactions that are coming through CFIUS currently are being briefed up to the highest levels of the agencies.

Mr. MANZULLO. I am sure they are now.

Mr. LOWERY. Right. And what we are saying is that basically we believe that one of the criticisms—there were two criticisms that came up.

Mr. MANZULLO. You are not answering the question.

You know, are these deputy administrators, deputy secretaries, assistant secretaries?

Mr. LOWERY. It depends on the initial transaction. But everybody can expect that the Deputy Secretary, Under Secretary and Assistant Secretary of the Treasury Department is being briefed on every single transaction.

Mr. MANZULLO. Really? Every single one?

Mr. LOWERY. Every single transaction is being briefed all the way up to the Assistant Secretary.

Mr. MANZULLO. One of the problems when you tell—you are not presently following the law when it says to inform Congress. The people who came in to give this briefing were very sincere, but they were also very young in terms of actual experience. I mean, you have to be experienced to understand this stuff.

As a Member of Congress, I want to be briefed by people who have a lot of authority, and I don't think that you guys got the message that you don't come in and say, this is top secret, and you tell me nothing I couldn't read in the newspapers; and then you throw out half of my staff because they didn't have a security clearance. And the people who did the actual briefing were not people who were high up the food chain in the different rounds.

Mr. LOWERY. I am not sure about the specific briefing you are talking about. But if you would like, I will—we can have higher-level briefings. Come anytime you would like.

Mr. MANZULLO. It is kind of late now.

Mr. LOWERY. Sir, I am trying to answer your question, which is basically—you asked who is clearing these transactions.

Mr. MANZULLO. Right.

Mr. LOWERY. And I have said that basically everybody, from the highest level of the Treasury Department; when we sign off on these transactions, the Assistant Secretary, which happens to be me, is signing off on those transactions.

I am a Senate-confirmed position. That is a fairly high level, and I am more than willing to come down anytime and talk to you about each transaction after a transaction closes, because we have to be very careful about proprietary information and intelligence sources.

Mr. MANZULLO. Well, nothing—

Chairwoman PRYCE. [presiding] The gentleman's time has expired.

Mr. MANZULLO. Thank you.

Chairwoman PRYCE. I want to thank the panel for being here. I am sorry for having missed your testimony. I will be sure to read it. I have started to read it.

We are going to have a series of votes, about 50 minutes of votes, so we will try to finish with this panel before that.

So at this time I will yield to my good friend, the gentlelady from New York, Mrs. Maloney.

Mrs. MALONEY. I would like to ask Deputy Secretary Baker, Department of Homeland Security, you mentioned that Homeland Security had been part of 170 reviews of CFIUS. Was Homeland Security part of the review panel that did Dubai Ports?

Mr. BAKER. Yes, we were.

Mrs. MALONEY. You were. Well, one of the concerns that was raised by the General Accountability Office report on which we based a lot of our movement in this legislation before us today was the narrow definition that CFIUS had used to define homeland security. The fact that CFIUS did not consider critical infrastructure, i.e., in this case, ports, as part of their definition of homeland security, and the legislation that we put forth would require CFIUS to

consider, quote, "critical infrastructure," and what assurances do we have that this addition will correct the problem?

Certainly the American people thought that 5 major ports, 20 ports in total, was major critical infrastructure. Yet Homeland Security, even, did not consider it major critical infrastructure.

And so what assurances do you have that the definition for homeland security will no longer be so narrow that obvious infrastructure, such as ports, rail, and voting machines, would not be considered part of the CFIUS definition?

Mr. BAKER. I can assure you that we have always believed that critical infrastructure is part of the definition of national security, and even in the Dubai Ports case, although we ultimately agreed that transaction could go forward, we made it quite clear that we believed that national security was implicated. Which is why we entered into a national security set of assurances with Dubai Ports and PNO, so—we wouldn't have had the authority to do that if we couldn't have justified it under CFIUS. So the agreement that we entered into, I think, gives you some assurance that we have already been viewing critical infrastructure as part of homeland security, part of national security.

We appreciate the clarification that the law will enact, which will make sure that everyone is in agreement on that, but I believe that the fact is, it will simply solidify our existing practice.

Mrs. MALONEY. Some have suggested to us that we might broaden our legislation to include some guidance to businesses and Congress as to what type of transactions need to be reviewed. Do you believe—I will ask this to anyone at the desk—that we should have some type of guidelines developed by Treasury or CFIUS or Homeland Security or the National Intelligence Director as to what we should be reviewing?

Obviously, buying ice cream stores does not need CFIUS review, but do you think that it would be helpful in helping the committee focus on what is truly a threat to homeland security, as opposed to reviewing absolutely everything?

And also your comments on the fact that now it is voluntary, it is not a mandatory process, and do you believe it should, in some cases, be mandatory, say, for a foreign-controlled ownership?

Mr. LOWERY. We think it is important that it maintain—that it continue to be a voluntary process.

We do welcome foreign investment in this country, and we think that if there are transactions that are dealing with national security issues—and there are some things that we look at that are fairly clear, such as the defense industrial base, such as critical infrastructure. And any company that comes in looking at those type of transactions, as an acquirer, is going to realize that the best thing they can do is to go through the CFIUS process, so they can get basically the safe harbor at the end of the process, so that they are not open to the CFIUS process going back at a later point in time and saying, why didn't you file, and you could overturn this transaction.

So it is actually—we believe that if you keep it at a voluntary process, this is a way to encourage companies to actually file and not try to hide beyond the radar screen, and that, we think, is an important part of the process.

Mrs. MALONEY. And secondly, do you think we should develop some type of guidance to businesses and Congress as to what type of transactions should go before CFIUS?

Mr. LOWERY. I think we could look at that. We need to be very careful, because then you could create the wrong type of incentives, and you could actually—if you define it too narrowly, you might find that there were transactions that fell outside of it, outside of the CFIUS base. If you divide it too wide, you might be getting too many potato chip-type manufacturers.

So I think putting the words "national security" could have an effect and basically explaining that we do need to take certain factors into consideration, such as critical infrastructure, such as defense issues, such as foreign government-controlled assets. Those are very important things that we should consider as factors.

Mrs. MALONEY. Okay. My time is up.

Chairwoman PRYCE. I would like to ask the panel, and especially Treasury and Homeland Security, if this CFIUS committee ends up with cochairs as opposed to Treasury chairing the body, do you believe there would be extra difficulty or extra bureaucracy or redundancy; or do you think that it would be a good idea, and we can just let go from there?

Clay, you go first.

Mr. LOWERY. We think that actually it is best left to the Executive Branch to figure out who is on the committee, who is chairing it, who is vice chairing it, if a vice chair is necessary. Having cochairs could help or harm the process.

Let me tell you real quickly what the Chair does. The Chair—the Treasury Department acts as an executive secretary, basically. It makes sure that all agencies are informed of what is going on in the process, makes sure that each agency has a chance to get its questions understood and answered, so I am not sure that having two chairs is going to help in that process.

We basically act as a secretary. We make sure we pass on information to the companies, and we chair meetings. It is not a humongous role. It is the role of a secretary type.

Mr. BAKER. I share some of those views.

I think it is an understandable notion that Homeland Security should be cochair to balance out a national security interest with the investment interests that the Treasury has represented.

The difficulty with assigning that role to any one agency is, there is no agency that encompasses all of the national security interests that might arise in a particular transaction. Many of the cases that arise are cases in which the Defense Department has great expertise and a strong interest, and the Homeland Security Department really quite properly takes a back seat to them. And so picking one of the agencies and saying, you will have national security responsibility, I think, creates some difficulties.

Second, I think the national security interests, at least Homeland Security as represented in this process has generally flourished under what Secretary Lowery described as an executive secretariat in which the Treasury's role is quite minimal. They move the paper around, make sure the meetings happen; they are keepers of the process.

To the extent that the bill makes the cochair stronger or gives them a larger role, there is always the risk that whoever that is, the other members' interests won't be represented as effectively as they are today.

Chairwoman PRYCE. But you both agree that currently it is more an administrative function than any kind of meaningful substance?

Mr. LOWERY. Yes.

Chairwoman PRYCE. In the interest of time and because there is a vote, I will yield back the balance of my time.

And Ms. Lee from California.

Ms. LEE. Let me say, first of all, I think all of you have indicated that the process could be enhanced and improved, and I am wondering if you could just go back to the Dubai Ports CFIUS process and tell me where you think the flaws were. That is the first question.

And then, secondly, I know that the GAO raised the issue that the CFIUS felt that a 45-day formal investigation period—they would be reluctant to initiate this because it would discourage foreign investment.

What is the—I mean, is that real or not?

Mr. LOWERY. In terms of the deepwater case, we think that basically we had two major flaws, and when we think that—we tried to address this in forms we are looking at.

First, our communication with Congress; that did not happen. And that was a mistake, and that was a problem on our part. And we need to improve on that, and we are trying to take steps to do that.

Secondly is that there was not appropriate—to get to Congressman Manzullo's point—high-enough-level attention. So we basically did probably a fairly good job of clearing this transaction on a horizontal basis across the different agencies and across all the professional experts, but we didn't do a good enough job getting it up the line. So that has been something of a concern to us.

Those are the two things that we feel like we have made a mistake on, and we think that some of the provisions of the bill help, some of the reforms that you all have suggested.

In terms of the GAO's point of view, or GAO's point, I guess, about whether or not the 45-day investigative period creates a problem for investment, our view is that it creates discipline within the system to have timelines, and it is important because in any government action, timelines do create the discipline you sometimes need.

What we would like: The vast majority of the transactions that we see can be cleared out in very timely fashion. Having a deadline helps us. If there is a concern regarding national security that cannot be addressed, then a 45-day extension of that investigative period is a good thing, and that helps us, and so our view is that basically—we can kind of clear out most of the transactions in a very timely fashion.

But for the ones that do raise extra concerns, having that extended investigation period does help us.

Ms. LEE. Thank you.

Chairwoman PRYCE. Thank you.

And Mr. Crowley, you do know there is a vote on?

Mr. CROWLEY. Thank you, Madam Chairwoman.

Mr. Lowery, you just voiced concerns about some of the mandates for allocating critical resources away from certain acquisitions that posed legitimate problems, as opposed to routine transactions with no potential for national security concerns. You state this with respect to mandatory investigation of acquisitions that do not present national security issues that require a Cabinet-level sign-off on transactions that do not raise potential national security concerns. With this concern, would resources also extend to the provision of the bill mandating 30-day-minimum DNI review of all transactions?

Mr. LOWERY. I think that it is important for the Department of—I mean, the Director of National Intelligence needs time to conduct its investigations and do its research work because it is a very important input valve into the whole CFIUS process in terms of figuring out what are the threats that are coming from specific transactions.

So I think that the DNI, having some time to do its work is very important to us, and I think that it can do its work during a 30-day review time.

Mr. CROWLEY. Congresswoman Maloney's question in regards to critical infrastructure and how this book defines that issue—this is for Treasury as well as DHS. Some of our colleagues in the House who are not necessarily on this committee have tried to craft definitions for "critical infrastructure" so broad as to encompass almost everything in our economy and then rule out these, quote, "critical infrastructures" to any foreign investment.

I believe that the bill we have before us, H.R. 5337, establishes a more flexible definition for "critical infrastructure," enough so that it is protected, but not overly broad as to limit our economy and stifle growth.

I was wondering if you could give your thoughts on the best way to define critical infrastructure with respect to the CFIUS process.

Mr. LOWERY. Well, I will defer to Stewart on defining "critical infrastructure" because he knows this a lot better than I do.

But I think that it is important for the CFIUS process to look at and take as a factor critical infrastructure, because we should; but there are critical infrastructure issues as defined broadly that are owned by many different companies all over the world, and it does not create any concerns for national security, and so that is the key thing.

We need to focus on what is the most important for national security, and we think that that can be done by making sure that all agencies—

Mr. BAKER. I think the relatively broad definition of critical infrastructure that is referenced in this act is a useful one as long as it is not mandatory, so there is some room for good judgment on the part of both agencies and potential investors.

Food and agriculture is obviously a critical infrastructure. We have to have that delivered, and it has to be free from terrorist attack. At the same time, we don't want to do CFIUS whenever somebody buys a farm in Iowa, even if they are from Germany. So some good sense has to be exercised, even after a relatively broad definition of critical infrastructure has been properly adopted.

Mr. CROWLEY. Even if they are from Germany? That is interesting. Thank you.

Chairwoman PRYCE. All right.

I want to thank the members for hurrying along here, and I want to thank this panel. We have about 50 minutes of votes; we will be in recess until 10 minutes after the beginning of the last vote. Thank you all very, very much.

[Recess]

Chairwoman PRYCE. All right. Thank you, gentlemen, so much, for your patience, but such is the way of the House. You have been waiting long, so without further ado, I would like to introduce our second panel. Mr. Douglas Holtz-Eakin, director of the Maurice Greenberg Center for—excuse me. We will have order in this hearing room—for Geoeconomic Studies, Council on Foreign Relations; Mr. David Marchick is an attorney with Covington and Burling; his practice focuses on international trade and investment, and he has advised numerous companies seeking approval for foreign investment under their Exon-Florio amendments. From 1993 to 1999, he served under the Clinton Administration. And Mr. John Veroneau is a partner with Piper Rudnick Gray Cary. He joined the firm after serving as General Counsel in the office of the U.S. Trade Representative, and as Assistant Secretary of Defense.

Chairwoman PRYCE. We welcome the witnesses to the hearing today, recognize them for a 5-minute summary of their testimony, and without objection, your written statements will be made part of the record and we may proceed. We will start with you, Mr. Holtz-Eakin.

STATEMENT OF DOUGLAS HOLTZ-EAKIN, DIRECTOR, MAURICE GREENBERG CENTER FOR GEOECONOMIC STUDIES, COUNCIL ON FOREIGN RELATIONS

Mr. HOLTZ-EAKIN. Madam Chairwoman, members of the committee, thank you for the chance to be here to talk about H.R. 5337. I think Congress is to be commended for its quick and timely actions in revisiting the national security issue in the inbound foreign investment, particularly after the Dubai Ports World transaction. I intend to make only four points. You are well familiar with the issues.

Point number one is that national security is paramount, but it is often framed as a tradeoff with economic policy, and indeed, in the vast majority of instances, they go hand in hand. As I indicated in my written statement and, as the experience that the Congressional Budget Office indicated, the United States may place tremendous demands in the form of military spending and other national security imperatives on the U.S. economy, and even in the presence of doing that, they will consume an ever smaller fraction of the output under typical economic growth. So keeping growth going is actually something that is good for national security.

And my second point is that financial markets are central to the prowess of the United States in superior economic growth. Post 1995, the United States has been unique among developed economies in having an acceleration of productivity growth. There are many who point to the IT industries and the success of smart and crafty engineers in beating Moore's law. I would point toward an-

other set of imperatives central to that, the openness of the United States to global competition in goods, services, and capital, and the role of capital markets in funneling money to new technologies, new markets, and otherwise choosing wisely where to invest the Nation's dollars to enhance productivity.

For that reason, because financial markets are the nerve center of a modern economy, and permeate a vast fraction of the economy, the risk of policy mistakes in this area is quite real and very difficult to quantify.

But my third point would be that given the past track record on economic and national security success, I don't think that we should be too concerned. There are obvious places where new considerations have raised the importance of targeted and tougher forms in the CFIUS process, areas like transparency and monitoring and improving expertise. A concentration on those areas will minimize the risk of intended consequences.

Point number four is because capital markets are allergic to uncertainty, it could very well be the case that a beneficial set of targeted reforms in this area would, in fact, improve overall capital market performance by removing the uncertainty that surrounds certain transactions at this time and allowing the business community to go forward in a more timely fashion on things that they would like to do anyway.

So in looking at this bill in particular, and this important issue in general, I think that it is desirable for the Congress to focus on national security and to, where possible, keep that on a very targeted basis to find those situations where transactions impair our ability to defend ourselves against our enemies or enhance the ability of our enemies to do harm to us, and by taking that as the guiding principle, it will lead to areas of critical infrastructure, it will lead to areas of important technologies, and it will lead to defense production capabilities that are important for national security by itself, and broad definitions of economic security or broader definitions in national security will be unnecessary with that kind of a focus.

I think it is entirely desirable to clarify timing so that parties to transactions know that for those without an essential national security component, they have a quick and timely exit from the process and can move forward, and it has been suggested this be parallel to the Hart-Scott-Rodino timing. I think that is entirely desirable.

I think the part of H.R. 5337 that focuses on expertise, funding where it is actually available for staff, follow-up in the success and mitigation agreements and the development of expertise and a track record for those mitigation strategies that are effective is entirely desirable, and the notion of improving transparency to Congress with regular reporting after the fact, not during investigations, and by embedding in statute the CFIUS process itself so that it is transparent not to the United States, but to the entire world, that will be a desirable outcome of this process.

In going forward, I think it is important to remember that the things that are done in the United States are important to global capital markets. Part of what is at stake here is the fact that our investments abroad are an important platform for U.S. exports.

The acquisition of subsidiaries in other countries enhances the business communities in the United States. By undertaking targeted but tough desirable reforms here we will set the stage for our countries to do this in the same fashion and provide benefits on a global basis.

Anyway, I thank you for the chance to be here today.

[The prepared statement of Mr. Holtz-Eakin can be found on page 45 of the appendix.]

Chairwoman PRYCE. Thank you. Mr. Marchick, welcome back.

STATEMENT OF DAVID MARCHICK, ATTORNEY, COVINGTON AND BURLING; AND JOHN VERONEAU, PARTNER, PIPER RUDNICK GRAY CARY

Mr. MARCHICK. Chairwoman Pryce, Ranking Member Maloney, and members of the committee, thank you for the opportunity to testify. Let me start by applauding your leadership, Madam Chairwoman and Ms. Maloney, as well as that of Chairman Oxley, Ranking Member Frank, and Representative Crowley, for offering this bill.

I believe the committee is now considering a very tough but effective bill that will restore Congress's confidence in the CFIUS process, enhance protection of national security, and at the same time, will maintain the United States' longstanding commitment to open investment.

I would like to cover three topics. First, the Exon-Florio process and your bill. The most important principle, in my view, that should guide Exon-Florio reform is to ensure that CFIUS has all of the tools and all of the time needed to scrutinize cases that present real national security issues while allowing the cases that do not raise national security issues to proceed through CFIUS in the initial 30-day period.

With a few minor tweaks, Madam Chairwoman, I believe your bill meets these objectives. The bill requires CFIUS to consider additional factors, and it adds additional time to the end of the investigation period rather than at the initial 30-day period, as in the Senate bill. The bill enhances accountability for both the Government and CFIUS and for transaction parties; it appropriately maintains Treasury leadership of the committee; it clarifies the security agencies' role in negotiating and enforcing security agreements; and it enhances transparency in the process, transparency that is much needed as your previous hearings have demonstrated.

I would like to point out a few issues that I would encourage the committee to continue to consider. First, acquisitions by some government-owned companies unquestionably raise unique national security issues and should therefore receive heightened scrutiny. But not all government-owned acquisitions create the same national security risk, and CFIUS should have the discretion to distinguish between transactions that raise issues and those that don't.

I would encourage the committee to clarify that CFIUS can allow acquisitions by government-owned companies to go straight to the investigation stage, and also CFIUS has discretion to close an investigation if no real issues exists, or if any national security issues have been mitigated.

Second, I also understand the committee's desire for additional accountability; it is very important. But I urge you to consider whether every single transaction needs to be approved at the Secretary or Deputy Secretary level. Some that, frankly, are not very significant deals, probably don't need secretarial level sign-off.

Third, CFIUS should never act if the DNI does not have adequate time to collect and analyze intelligence related to a particular transaction. But by creating a 30-day minimum for intelligence reviews and requiring that the reviews be completed no less than 7 days before the end of the initial 30-day period, the bill creates a de facto 37-day process, even for transactions that raise no national security issues.

I am confident that a provision could be fashioned to allow DNI to do its job well without slowing down the entire process.

Second, the impact of Congressional scrutiny on CFIUS, on the operations of CFIUS. There should be, and frankly your leadership is important in this, additional Congressional oversight of, and transparency into, the CFIUS process, but too much scrutiny may result in paralysis of the process. In the current political environment, frankly, no agency official wants to be the person to sign off on the next Dubai Ports World transaction, and so there is real danger that deals that should be approved will be rejected or that unnecessary and burdensome conditions will be imposed on companies simply to provide cover for the bureaucracy.

The private sector has already responded to this more cautious regulatory environment by filing many more cases. There have been 32 filings this year, and at this pace, there could be up to 85 or 90 filings, a 30- to 40-percent increase.

A few numbers will illustrate the danger of overwhelming the system. Since President Bush went into office, there have been some 285 or so filings, 52 of these involved foreign government-controlled acquisitions. Ten transactions went to the investigation stage or the extended phase, the second phase. With the tightening of the Byrd rule, which is done in both the House and the Senate bill, each of these 52 government-controlled acquisitions would have required a full investigation and on top of that, the Senate bill contains a provision that creates a de facto presumption that all foreign investments in critical infrastructure creates a national security risk. If that provision is adopted on top of the Byrd rule tightening, one can imagine a scenario where up to 60 percent of the filings have to go through the full investigation phase and this could completely overwhelm the system.

Again, no one is arguing against tough scrutiny, it is critical for our national security, but it is just that allowing CFIUS to focus on those transactions that raise real issues is critical.

Third, the protection of critical infrastructure. This is a very important issue, particularly as you move into the conference committee stage with the Senate. CFIUS should be given the flexibility to spend its scarce time and resources to focus on those transactions that create real risks.

I think your bill, Madam Chairwoman, and Ms. Maloney, has it exactly right, that is, you have required critical infrastructure to be a factor to consider in the CFIUS consideration, but nothing more, nothing less. Creating an outright ban on foreign investment crit-

ical infrastructure, as Chairman Hunter's bill would do, would both harm job creation and undermine national security. And it would similarly be unwise to create a presumption that all foreign investments in critical infrastructure pose a national security risk.

Again, the important thing is to give CFIUS discretion to deal with those transactions on a case-by-case basis, focusing on those cases which raise real issues and dispensing of those that don't.

Let me close by applauding your work once again. This has been an extremely deliberate and careful process, one that you started with hearings. Your staff has been terrific and very diligent in seeking out advice and input on the issues, and it has been as bipartisan a process as I have seen in my 15 years in Washington, so I am grateful for the opportunity to testify before you today and look forward to working with you and your staff as you continue this process.

Chairwoman PRYCE. Thank you very much.

[The prepared statement of Mr. Marchick can be found on page 53 of the appendix.

Chairwoman PRYCE. Mr. Veroneau.

STATEMENT OF JOHN K. VERONEAU, PARTNER, DLA PIPER RUDNICK GRAY CARY

Mr. VERONEAU. Thank you, Madam Chairwoman, and Ranking Member Maloney. Before I offer my brief prepared remarks, let me just say how much we appreciate your commitment to getting this right. This is an important issue, and it is clear that you are both committed to getting this right.

My testimony represents the views of the Business Round Table, the Organization for International Investment, the Financial Services Forum, and the U.S. Chamber of Commerce. First and foremost, we appreciate the deliberative and bipartisan manner in which this legislation has been developed. The bill takes important steps to protect against foreign acquisitions that might threaten national security including creating a clear statutory role for the DNI, extending the investigation period if necessary, and allowing CFIUS to reopen previously approved transactions if security agreements are seriously breached.

We support strong measures to assure that national security interests are protected. We hope to work with the committee, however, to address concerns with certain regulatory burdens in the bill that may serve no national security interest.

The Government has a duty to assess security risks of a transaction but should not presume foreign ownership to be an inherent threat. No president should ever hesitate to block an acquisition that truly threatens national security, but it is important that the process by which such risks are considered does not hamper legitimate foreign investment.

While CFIUS has adapted itself to the post-9/11 threat environment, and for the most part has worked well, we appreciate the goal of this legislation to restore public and Congressional confidence in it.

We believe that legislating in this area should be guided by four key principles. First, national security relies heavily on economic security. All prudent steps must be taken to reduce risk but regu-

latory systems that impose burdens serving no national security purpose undermine U.S. competitiveness.

Second, the focus of CFIUS must be risks created by the acquisition. There is baseline risk associated with the misuse of any company or its people. The essential question for CFIUS is whether foreign ownership itself creates new and definable risk.

Third, CFIUS must have the time to vet thoroughly any security risk, but there should be clarity and certainty for approving in a timely manner transactions that pose no threat. Non-controversial acquisitions should be approved on the same 30-day time line as the Hart-Scott-Rodino process for anti-trust reviews; otherwise, foreign investors would be unfairly discriminated against and sellers would be denied the opportunity to get best value for their assets.

Fourth, CFIUS should not become politicized. Foreign direct investment in the United States is an important engine for job creation; we should welcome it.

On balance, we believe that these four principles were taken into account in drafting this legislation, and we appreciate you and your staffs' commitment for this. The bill strengthens CFIUS's focus on national security and excludes provisions like a legislative veto that, if enacted, would hurt investment and provide no security benefit.

We do, however, hope to work with the committee in three areas. First, the bill's preservation of the 30-day review period is undermined to some extent by the provision that prevents the DNI from completing its analysis in less than 30 days. The DNI must have sufficient time to complete its work, but in cases where this analysis can be done in less than 30 days, it should be allowed to do so.

Second, mandating that certain classes of acquisitions must go to the 45-day investigation can be counterproductive by forcing CFIUS to spend time and resources on matters posing no security risk. For purposes of this mandate, we believe a distinction can be made between companies wholly owned and controlled by foreign government from those where the foreign government is simply a minority investor.

Finally, we encourage the committee to use great caution with regard to notice and reporting requirements as they can divert scarce resources away from the national security focus.

In recent months, the Administration has taken a number of steps to build confidence in the CFIUS process. To the extent that Congress believes that statutory changes are necessary to assure that CFIUS is protecting national security while maintaining an open investment policy, we believe this legislation achieves this goal.

I thank the Chair and welcome any questions at the appropriate time.

[The prepared statement of Mr. Veroneau can be found on page 62 of the appendix.]

Chairwoman PRYCE. Thank you very much to our panel. I would like you to talk to me a little bit about the timing, and not being a practitioner myself, how it works now and how the changes that we have made could affect it now. Does the committee ever release these cases before the time periods are up, or do they run their

whole course? That is one question. Do you think that these time frames that were created with Hart-Scott-Rodino are at all arbitrary, do you think time should be the qualifying agent here, that we use time as opposed to thoroughness or—let's just talk to that because it seems fairly arbitrary that we just decide these 15-day increments, and if they work, why do they work, and take it from there. Any of you.

Mr. MARCHICK. That is an excellent question, and I would say that the issue that has been most intensively discussed in this whole CFIUS reform process are the time periods. It is an arbitrary number, 30 days, and one could easily pick 45 days, 60 days. There is no magic. But as John and Doug said, the Hart-Scott-Rodino process which applies for both domestic acquisitions and foreign acquisitions has a 30-day initial time period, and it is critical to create a parallel process so there is not discrimination against foreign acquisitions.

The important thing in any process is to make sure that the process is flexible enough so that they can scrutinize, dissect, and work through the tough cases, and I have had cases that have taken up to 11 months, even though there is a 90-day clock. Frankly, if CFIUS wants you to push a case, if they don't have enough time, they have lots of levers to force you to withdraw. And other cases where frankly they could complete the review in 15 days.

So time periods are important to create discipline and to create a level playing field for foreign and domestic investors, but you also want enough flexibility for the tough cases, and I think your bill improves that process.

Mr. HOLTZ-EAKIN. I think that is basically where I come down. I guess the things I would emphasize are, number one, the Hart-Scott-Rodino timing is both arbitrary, but has also worked, and so to tie yourself to that has some merit. There is no great feeling out there that somehow those time frames, while arbitrary, are wrong. They seem to work just fine. I think there is some virtue to making it both parallel and picking something that has worked.

The second thing is, I think, Assistant Secretary or Deputy Assistant Secretary Lowrey was pretty clear in saying that having a maximum time for reviews which are really going to be uncontested, there is no great national security threat, having something that drives the process to completion within a certain time frame, 30 days, is valuable. So framing it, it will take no more than 30 days for those reviews that are not controversial, I think, is important to make sure that the parties to the transaction have some clarity about what they are getting into when they start. I think that is important. I think—then I will stop.

The real question is whether you want to have this big asymmetry between the different variations of government-controlled versus those which are not, and that is going to be the hard question on the timing.

Chairwoman PRYCE. And you don't think the increased scrutiny and the higher levels in each agency will require more time? You don't think this is an unrealistic time as we—even if we don't legislate it, it is required by the atmosphere. Comment?

Mr. VERONEAU. Madam Chairwoman, from my perspective as someone serving on CFIUS, there were clearly times when there

were complicated issues and we were all being pushed to sort of get our homework done, but I honestly never felt there was an instance where we were being forced to make decisions without the full benefit of being able to digest the information and the analysis. And as Dave alluded to, in those cases where the government just can't get its work done, we tell parties that they need to withdraw, and we need more time on this, and it has worked. I think it has the benefit of providing flexibility to the system, but frankly, also discipline. You need a disciplined process, and you need deadlines. I know that in college, I got a lot more papers done by having a deadline than I would have otherwise. I think you need a deadline.

Mr. HOLTZ-EAKIN. I think the way you structure the bill has some interactions that should be recognized. By having enhanced reporting of mitigation agreements and how successful they are, you build a track record internally to the CFIUS process so that when Administrations change and new people come to this, they can build on that expertise, and it won't take as much time as it might have in the past.

Even if the time frames might look optimistic at the moment, as you build expertise, they won't be as hard to reach.

Chairwoman PRYCE. Thank you. My time has expired. Ms. Maloney.

Mrs. MALONEY. I want to thank all of you for your testimony. I believe in the Dubai Ports deal, one of the reasons we put the time frame requirement of 45 days is that the CFIUS board made a decision that it wasn't a threat to national security and many Americans believe, and I believe also, that selling 20 ports and 5 major ports which the 9/11 Commission says are the most prone for terrorist activity, merited the 45 days.

I think also there is a concern about a government-controlled acquisition and that they have certain advantages that really undercut the free market capitalistic system. They are able to pay more, they are able to control the finances, in many cases, of their country. By some accounts, Dubai Ports World was paying 20 percent more than anyone else, and some professionals were quoted as saying it was not a realistic amount that they were paying, it wasn't tied to reality, it was tied more to the fact that a government-owned entity could pay more.

And so I personally believe that a government-owned situation should have greater scrutiny and we should look at it more carefully. My question is what is a government-controlled transaction? Obviously, in Dubai Ports, it was very upfront; this is United Arab Emirates, we are buying it. But oftentimes, the government may give to a private company 99 percent of their money, at which they are now, quote, "private" and they are out buying American firms and American infrastructure.

So my question to you is what is your definition of a government-controlled entity, or what definition do you think it should be and could you respond to the allegations that some governments are not upfront. What they do is they create a shell corporation, even put 90 percent of the money into an American—to a shell company that is now "independent" and that company then goes and buys.

What oversight do you think we should have for that type of situation?

Mr. MARCHICK. It is an excellent question, and let me start by complimenting you for, first, introducing H.R. 4915 and for the work you have done, and I was pleased to see that Chairwoman Pryce incorporated a significant amount of that bill into your collective bill.

First of all, from an economic perspective, I think that there should be a strong U.S. Government policy that encourages foreign governments to privatize state-owned companies. We have pursued that in trade agreements; we should continue to do that.

Second, there are times when foreign government-owned entities do have access to preferential financing or subsidies that put U.S. companies at a disadvantage, and there should be a strong and robust economic approach to that. Whether that creates national security issues is another question. But there are times when foreign companies, foreign government owned companies do have benefits and advantages that frankly are discriminated against U.S. companies.

The question of government control and when a company is controlled by the government is a very complicated one, it is a very difficult one. CFIUS has, in their regulations, a very expansive view of what control is. If there is an investment of over 10 percent, there is a presumption of government control, but there are times when they found government control even when there is less than 10 percent. For example, if there is a case where the government provides 99.9 percent of the financing, approves the CEO, has veto rights over significant corporation transactions, then it is clear that's a government-controlled company.

And so CFIUS has utilized a very expansive definition of control in which they look at the totality of the evidence, not just in terms of ownership stakes but also other indicia of control like the number of board seats, the type of contracts they have, and whether the government is the main customer, and I think that is an appropriate approach for it.

Mrs. MALONEY. I would say that in trade, many American businesses have come to this committee and testified that they feel they are sometimes disadvantaged in our exports because other foreign countries will subsidize to a huge degree, even 50 percent, whereas they are a private company. They say when you are not subsidized, which they are not in our country, it puts them at a tremendous disadvantage.

I am wondering if a totally subsidized government company is coming in to buy parts of America, should that be part of the process to point out the amount of subsidy from the government, if you follow my point. Because if the government decides they really want to buy something, they can totally subsidize it to a point that no one can compete. I mean, no foreign country can compete, no American company can compete.

So do you think that the amount of government subsidy from a foreign country should be part of the decision in the CFIUS process. Because if it is heavily subsidized, there is no way any other country or American company can compete.

Mr. VERONEAU. Ms. Maloney, if I can answer that. I think you raise an important policy question, and I would analogize it to, as you know, we have the trade remedy laws, the countervailing duty

that allows us through the Customs Service to put additional duties on imports if they are coming from a subsidized source.

So the theory that you mentioned, and the concern that you raise is one that has precedent in our trade laws. Personally, I would be concerned about blending some of those economic concerns, regardless of the merit, into the CFIUS process. I think the CFIUS process, since its origins in the mid 1970's, has stayed true to its focus of national security. Now, reasonable minds can disagree as to whether CFIUS has come down on the right side of the line, but I do think there has been great effort and correct effort to make sure the focus of CFIUS remains security concerns, not other concerns, not economic concerns, regardless of their merit.

Chairwoman PRYCE. The gentlelady's time has expired. Mr. Manzullo.

Mr. MANZULLO. Thank you very much. I am sorry I didn't have an opportunity to listen to your testimony. I guess the question that Mrs. Maloney was asking, perhaps it has no answer, at what point does impaired economic status on behalf of a competitor of a CFIUS petitioner rise to the level of national security interests? If you have a company coming in that is a state-owned enterprise that say corners the market on a commodity, titanium, for example, copper, in the United States, I think we are reaching a point in this inquiry where there has to be some guidance from those of you who have been involved in this thing for years to try to address the question, at what point does economic security become a question of national security.

If you don't have the answer to it, I don't expect it, but at least I would like to have your thoughts, because I know everybody is grappling with that question.

Mr. HOLTZ-EAKIN. I think you should focus on national security and get the right answer. I think in the example you gave, the national security issue is defense production with a scarce material like titanium and the focus on that would lead you to be comfortable or not comfortable with the transaction, regardless of the level of subsidy. I think that there is an appropriate concern about level playing field in international investments, but that is not a problem for the CFIUS problem.

It is a real problem, one that the United States needs to be constantly engaged in with other countries, and we can perhaps get level playing field rules across the globe, but that is not a CFIUS problem. The CFIUS problem is keeping us safe and keeping the eye on the ball there will get you the right answer.

Mr. MANZULLO. Anybody else?

Mr. MARCHICK. I agree with that, and I think the CFIUS process is equipped to deal with those issues through conditioning investments in materials or in technology that is critical for our national defense or for our national security. For example, you can go back to World War I and World War II when there was significant German investment in the chemical industry and other sectors, and there is actually evidence that shows the fact that the investment was here and the technology was here actually aided our ability to fight World War I and World War II.

So I think CFIUS can look at if there are critical materials or technologies that need to stay in the United States, CFIUS can

condition the approval of any investment on maintaining certain of those technologies, certain assets in the United States, which is how you approach it from a national security perspective.

Mr. VERONEAU. I would just add, Mr. Manzullo, in agreeing with my colleagues here, that your question is precisely why we want to have a very broad and flexible definition of national security, because the hypothetical you posed, I think, would raise security issues and CFIUS needs to have the flexibility to look at that stuff.

Mr. MANZULLO. Let me tell you what my concern is. As you know, foreign direct investment is down in this country. FDI has, as I said in my opening statement, it has saved huge numbers of manufacturing facilities in my district. For example, the Japanese purchased the last U.S. sewing machine company, Union Specialties. If the Japanese had not come in with their know-how and management skills, it wasn't so much money, but they were the only ones who knew how to run that industry.

And what my concern is, and what I like about Mrs. Pryce's bill, I am the co-sponsor on that, is it really takes a good look at opening the process but not revealing trade secrets, and respecting the fact that without foreign direct investment, manufacturing in this country would be imperiled, and any attempts I think to, I don't want to use the word "strengthen" the bill, but to make it more restrictive would scare away foreign direct investment.

We are fighting now with the western hemisphere travel initiative. I voted against that bill. Our Congress mandates that people in the United States literally have to buy a $95 passport or a $50 passport equivalent card just to go to Canada and back. And the Europeans and the Asians are noting with great interest, whether or not we work that out because if we don't, that is another reason for them not to get involved in foreign direct investment.

Mrs. Pryce has a lot of manufacturing in her district. Ms. Maloney, I don't know if you have a lot of manufacturing where you are. But the largest county in my district has the second most dense manufacturing base of any county in the Nation, with a population in excess of 250,000. One out of four jobs is directly related to manufacturing.

And so we are being very, very cautious on crafting that bill, and I want to be very careful to make sure that somebody doesn't come in there and make it more difficult for foreign direct investment to come to this country.

Mr. MARCHICK. May I respond to that briefly? First of all, Mr. Manzullo, I couldn't agree with you more, and I applaud the work that you have done to essentially preserve our manufacturing base in the United States. I think, Mrs. Pryce, Mrs. Maloney's bill does a lot to strike the right balance in terms of defensively dealing with foreign investment to make sure that foreign investment doesn't compromise our national security, but there is a lot of work that we can do to have an offensive strategy to promote foreign investment.

I can give you a few ideas. First, there is no Federal policy to promote foreign investment. President Reagan and President Carter before that had actually issued formal statements of policy to welcome foreign investment, and I would encourage you to encourage this Administration to do so, as well.

Second, we have a huge expert promotion apparatus in the Commerce Department. You have done a lot of work on that, Mr. Manzullo. There is absolutely no intention at the Federal level to promoting inward investment. Every single Governor in the States that you represent takes missions and fights like the dickens to bring foreign investment in. We should be doing that at the Federal level.

Third, we can be doing a lot of work in the G7 or G8 and the OECD and frankly Congressional commissions like the one that you have with China to say that we are open to foreign investment to develop global policies that will foster more foreign investment.

I think the United States and this committee should consider both the defensive strategy with national security and an offensive strategy too.

Chairwoman PRYCE. The gentleman's time has expired. Mr. Sherman.

Mr. SHERMAN. Thank you. A few general questions about the situation we find ourselves in, a few comments. We are running this huge deficit with the world because we have had failed trade policies, not under this Administration only but also under the prior administration. A huge amount of dollars that are used not to buy our products but rather to buy pieces of America and they are either going to buy our securities, which are indirect claims to pieces of America, or they are going to buy pieces of America directly at our factories or farms, etc.

The second thing that led to the Dubai problem is that we have failed to get our share of the shipping business, and we have given it up, just as we have done everything, almost everything possible to lose all the jobs that pay between $20 and $40 or the $20 and $50 an hour. And so since foreign interests control all of the shipping that virtually comes in and out of our ports, or virtually all, they now want to control the ports themselves, and this whole transaction was one between the British and the United Arab Emirates company.

The other reason this became a problem is the phenomenal tone deafness of those in the Administration who are handling this issue. They really thought that they could sweep it under the rug, or worse yet, they didn't even think that Americans would care. There isn't a single Member of this House who didn't know this thing was going to explode the minute it became public, and yet dozens of people in the Administration couldn't see it.

For that reason they didn't—the Administration did not quietly tell Dubai not to buy the ports. So instead of quietly disappointing them, we have now done irreparable harm to our position with the Arab world.

One of the other reasons why Dubai was fooled into that they could go forward with this transaction until it blew up on them is that we don't have clearer standards of what factors should be considered in determining whether to approve one of these deals. And the standards ought to include, and I hope to work with the authors of the legislation to achieve this, to look at whether the proposed owners themselves, in this case, the government was the owner or the ultimate owner, is the proposed owner of our sensitive assets cooperating with us in dealing with terrorism.

Second, do they—and they may do this simultaneously, do they support terrorism? I think it is relevant to ask whether they support the international boycott of Israel.

But looking at the United Arab Emirates, here that government controlled the Dubai Ports company, and at the same time that government supported entities on the U.S. terrorist list. The president of the country participated in telethons for terrorists. No one at Treasury or elsewhere even bothered to take note of this. Why? There is no standard in the statute.

So to tell us that our ports are going to be controlled by a government that has telethons for terrorists flies in the face of everything that the American people are going to insist on. So I would hope that we would write a statute that looks at the host government of the proposed buyer in terms of cooperating in dealing with terrorism, not allowing its citizens to support terrorism, and international boycotts, and also looks at the owners and all of its affiliated entities, cooperation on the war on terrorism, absence of support for terrorism, and the international Israeli boycott.

Here, that host government was the owner, as I pointed out, and that is a government that has supported Hamas and so many organizations that are on the terrorist list.

My question for our panel here is you are familiar with the bureaucracies that signed off on this. How could they possibly have thought the American people would tolerate having a terrorist supporting government? Now I am not saying they don't all cooperate at some times. This is a schizophrenic government to some extent. But to have a terrorist supporting government controlling so many of our major ports, how did they miss this one?

Mr. HOLTZ-EAKIN. I am the economist, so I am the least well equipped to understand how everyone will think. I think the bill addresses this problem. I think it addresses it in a very sensible way, and that is by having the Chair and the Vice Chair sign off on all the transaction, you ensure that there is a pattern of tone deafness built into this system.

I know Mr. Marchick disagrees with me, but I think that it should be the responsibility of the Chair and Vice Chair to ensure that their staffs take really ordinary and mundane transactions and get them to them in a timely fashion, they sign off, and that they place sufficient confidence in their staff.

So I think the bill gets to this, it might like onerous on paper but—

Mr. SHERMAN. I agree with you there, but can anybody on the panel explain how they blew the Dubai Ports deal? How could those bureaus and agencies, even if it wasn't being signed off at the highest level, be just so completely ignorant of the views of the American people?

Mr. VERONEAU. At the risk of walking into this hornets nest, and I speak here for myself, I think the case that was made in the Administration was that you have a country that has been cooperating since 9/11 with this Administration.

Mr. SHERMAN. Did anybody in the Administration and this process point out the UAE was having, even after 9/11, telethons for terrorists?

Mr. VERONEAU. I am obviously not privy to those questions, but I do think there was lots of cooperation with the Department of Defense and with DHS with this company and this country and there was another side of the argument that this didn't pose a national security problem, putting aside the communications problem that obviously the company brought upon themselves.

Chairwoman PRYCE. The gentleman's time has expired. Mr. Crowley.

Mr. CROWLEY. Thank you, Madam Chairwoman. I appreciate the questioning of my colleague from California. What I really want to do is for the record ask a couple of questions to get on the record some answers as pertains to the legislation before us now, H.R. 5337. Mr. Marchick, there are concerns by some that allowing the CFIUS process to continue will weaken our national security and allow for more Dubai Ports deals. They argue the CFIUS process should be mandatory for all foreign investment in the United States.

What are your thoughts on this, and do you think making CFIUS and its process mandatory for all foreign transactions in the United States, do you think that will strengthen national security, and if not, why not?

Mr. MARCHICK. Thank you for the question, and thank you for your work with the Chair and with the ranking member on this bill. I really appreciate that. My view is the voluntary process and maintaining that approach strengthens national security and is good economic policy as well. It strengthens national security because it allows CFIUS to focus on those transactions that really raise national security issues as opposed to processing hundreds or even thousands of foreign acquisitions that are made every year.

There are literally thousands of foreign acquisitions of pieces of real estate, farms, dry cleaners, you name the business, that don't raise any national security issues and don't need to be reviewed by the government.

Second, from an economic policy point of view, the United States has literally, for decades, pushed other countries to dismantle their foreign investment review boards that are unrelated to national security, going back to Reagan and the U.S. Canada free trade agreement, all the way up to President Bush and the U.S.-Australia free trade agreement.

So there are very, very strong incentives for those companies for which acquisitions could potentially affect national security to file. The potential negative ramifications of not filing are very, very severe. There is no statute of limitations, the transaction can be unwound at any time. There are very strong incentives and I think the voluntary filing system works and changing it to a mandatory filing system would so overwhelm the process that it would actually undermine national security.

Mr. CROWLEY. Thank you. Mr. Marchick and Mr. Veroneau, in the testimony you both raise concerns about the mandatory minimum 30-day study for all CFIUS reviews of transactions. This provision appears to make all reviews of transactions by CFIUS equal in the eyes of the committee.

I too have been hearing other concerns about this provision. Some argue that this provision mandates a thorough intelligence

investigation of all CFIUS transactions which would benefit our national security. Your testimony makes me think you do not agree with this assessment and could you explain, and I would like to, if I can, I have one other additional question in case times runs out, I would like to ask the Chair for 1 additional minute.

Chairwoman PRYCE. Go right ahead.

Mr. VERONEAU. Mr. Crowley, I think clearly the legislation reflects a very legitimate concern that the intelligence analysis has to be thorough and there has to be time to do that. So I understand why the 30-day minimum was put in there. The only thing I would counsel is there are many times where that analysis can be done in a much shorter period of time because the transaction is not complicated, doesn't raise serious issues, or more likely, it is with parties that have been through this process numerous times and are known entities to the intelligence agencies, et cetera. So there is no national security benefit to insisting that they couldn't turn in their assignment before 30 days if the facts and circumstances allow it.

Mr. MARCHICK. I agree 100 percent.

Mr. CROWLEY. Again, with the Chair's indulgence, the issue of over politicization of the process, it is my understanding the proposed mergers between the French telecommunications giant Alcatel and Lucent Technologies, as well as the Japanese conglomerate Toshiba and Westinghouse Companies, have raised a few eyebrows here in Congress.

Do you trust the CFIUS process to fairly judge these possible mergers or should Congress have a say in these and every day controversial CFIUS committees before the committee can make a final recommendation, as some Members of Congress are demanding, or should it be as we have formulated in this bill, post-CFIUS decision.

Mr. MARCHICK. I would just refer you back to a statement by Ranking Member Frank in one of the earlier hearings where I would fully endorse the comments that he made, that it is both dangerous and inappropriate for Congress to get too deeply involved in a transaction, in a review of a transaction while the review is pending.

In my view, that invites politicization, it risks leakage of proprietary information. The mere fact that companies would know that significant amounts of transactions specific data would be flown to the Hill would actually chill investment itself, because they would want their proprietary data up on the Hill before the review or after the review. I have been involved in transactions where some of that data has gotten to the Hill, and then it has gotten to competitors and competitors have taken that data and gone to customers of my clients and other companies, and basically said this company creates a national security risk, CFIUS has concerns about it, you should stop buying from them because they are a national security risk, and that affects jobs, the stability of the company, and it tarnishes the acquiring company's record.

And so I think that you have—your bill has it right. It avoids notice of every transaction, it avoids transmission of transaction specific data to the Congress, and rather focuses on in a semiannual report aggregate and trend data, which is more appropriate and

will allow to you do your important oversight function better than getting 85 briefings a year on 85 transactions.

Mr. VERONEAU. The only thing I would add is if you look at the history of CFIUS as laid out in Mr. Marchick's book, CFIUS is always one step away from being over-politicized and the process being, in my view, abused by someone who, for economic reasons, wants to queer a deal. I think the bill properly reflects that risk, and I think has it right in terms of trying to minimize the opportunity for politicization.

Mr. CROWLEY. Mr. Holtz-Eakin.

Mr. HOLTZ-EAKIN. I think on this one the Congress should stay out of individual deals, and the best way to see it hold the mirror up and think of the advice that we have been giving to other countries that want to duplicate our success in using private markets to generate good standards of living. We advise them to rely on capital flows and the government to allocate capital and to put in place rules of law, provide transparency and respect property rights. A bill of this type is supportive of that sort of environment, a bill that puts every transaction in the hands of the Congress is not.

Mr. CROWLEY. Thank you, and I thank the Chair.

Chairwoman PRYCE. I want to thank the committee and the panel very much. We may have members who have other questions. We will leave this record open for 30 days and if they do, we will submit them to you and you can get back to us in writing. We would appreciate that. And with that, the hearing is adjourned. Thank you very much.

[Whereupon, at 5:04 p.m., the subcommittee was adjourned.]

A P P E N D I X

May 17, 2006

Written Statement of
Stewart Baker

Assistant Secretary for Policy

Before the

House Financial Services Subcommittee on
Domestic and International Monetary Policy, Trade, and Technology
Wednesday, May 17, 2006
2 p.m.

I thank Subcommittee Chairwoman Pryce, Subcommittee Ranking Member Maloney, Committee Chairman Oxley and Committee Ranking Member Frank, and all of the distinguished members of this Subcommittee.

I appreciate the opportunity to speak briefly today regarding the Department of Homeland Security's role as a member of the Committee on Foreign Investment in the United States and DHS's support for CFIUS reform.

DHS's CFIUS Background

The Department of Homeland Security is the newest member of CFIUS. We became a member in March 2003, soon after our conception bringing together 22 diverse agencies whose common mission is the protection and security of our nation and people. Since that time, we have participated in the review of more than 170 foreign acquisitions involving some of the nation's critical infrastructure, technology, and other assets vital to our national security.

I mention our origins to stress what I believe is a key strength of the Department – we bring to the CFIUS a diversity of viewpoints, expertise, and skills. The government agencies from which we were formed give DHS a broad perspective, informed by an understanding of infrastructure threats, vulnerabilities and consequences. DHS generally leads CFIUS reviews of transactions involving critical infrastructure, and when we ask for security agreements to address national security risks in those cases, DHS is careful to monitor compliance with those agreements in coordination with other CFIUS agencies who are parties to the agreements.

I think my CFIUS colleagues will vouch for the fact that we take our role in CFIUS seriously and interpret our security mandate broadly. When DHS raises national security issues it frequently proposes and participates in the development of mitigation measures. DHS's forward-leaning stance on security issues sometimes gives rise to debate within CFIUS, but it is a healthy debate that ultimately enhances national security and investment. A substantial portion of DHS was formed out of the Treasury Department and we have no doubt our dual mission requires us to protect homeland security while maintaining an open investment policy.

In case it is not clear from my remarks so far, I should say explicitly that the CFIUS process is one of DHS's highest priorities. When I became Assistant Secretary for Policy, one of the first individuals I hired was someone whose primary responsibility is to help manage the Department's CFIUS program, and we are continuing to build our CFIUS staff. The number of CFIUS cases is on the rise, and our staffing plan is responsive to that fact.

CFIUS Reform

As to reform of the CFIUS process, I'll briefly make three points. First, let me commend the members of this subcommittee for your thoughtful and productive work in your efforts to balance national security and open investment principles.

Second, DHS fully subscribes to the principles for further improvement that were articulated by my Treasury colleague. While DHS functions as an autonomous agency within CFIUS, the Treasury reform principles have our complete support.

Third, DHS is pleased to be involved in this dialog about the reform of the CFIUS process and to lend our expertise and experience in the reform process. We hope that you will continue to reach out to us, and we stand ready to provide our technical expertise in helping to ensure that national security and open investment principles are balanced in a manner that benefits our nation.

Statement
of

Alice S. Fisher
Assistant Attorney General
Criminal Division
Department of Justice

Before the

Subcommittee on Domestic and International Monetary Policy
Committee on Financial Services
United States House of Representatives

Concerning

H.R. 5337, Reform of National Security Reviews of Foreign Direct Investments Act

Presented on

May 17, 2006

I. INTRODUCTION

Madam Chairman, Ranking Member Maloney, and Members of the Subcommittee, I appreciate the opportunity to discuss the Department of Justice's role as a member of the Committee on Foreign Investment in the United States ("CFIUS"), which implements the Exon-Florio Amendment to Section 721 of the Defense Production Act of 1950 ("Exon-Florio"). The mission of the Department of Justice includes defending the interests of the United States and ensuring the public safety against threats both foreign and domestic. Because Exon-Florio is a tool for protecting national security, its effective implementation is important to the Department's mission. The Department is keenly aware of the significance of its responsibilities under Exon-Florio as a member of CFIUS, and we have worked extremely hard to meet those responsibilities with the utmost vigilance

II. ROLE OF THE DEPARTMENT OF JUSTICE IN IMPLEMENTING EXON-FLORIO

The Department of Justice uses all of its law enforcement and investigatory techniques and resources to protect the national security and ensure public safety; however, Exon-Florio is an important national security tool when no other statutory authority exists, apart from Exon-Florio and the International Emergency Economic Powers Act, that is adequate to protect national security. Working with the rest of CFIUS, the Department carefully assesses each transaction that comes before CFIUS for review to determine whether the transaction could pose a risk to national security.

The Department of Justice has actively contributed to CFIUS deliberations regarding national security through identifying issues and providing expertise in areas such as counterterrorism, including terrorism financing; counterintelligence, with a focus on United States information and technology relating to national defense and critical infrastructure; and cybercrime and protection of the privacy of United States communications. The Department has also sought to ensure that the law enforcement community, including the Federal Bureau of Investigation ("FBI"), has the necessary tools to protect national security, ensure public safety, and enforce the laws.

The Department draws on its diverse resources to address the complex issues raised by the variety of transactions coming before CFIUS. The Department's Criminal Division closely coordinates the involvement of various departmental components in the process. These components include: the FBI, which both coordinates with the intelligence community and provides operational and analytical support in the areas of counterterrorism, counterintelligence, critical infrastructure protection, privacy protection, and electronic surveillance; the Computer Crime and Intellectual Property Section, which provides expertise related to the United States

communications system, cybercrime, and privacy protection; the Office of Enforcement Operations and the Narcotic and Dangerous Drug Section, both of which provide expertise related to electronic surveillance issues; and the Counterespionage Section, which provides legal guidance on counterintelligence issues. The Office of Intelligence Policy and Review assists with intelligence community coordination. The Counterterrorism Section assists with reviewing transactions that may implicate terrorism concerns, including terrorism financing. In addition, the Antitrust Division has provided support and input in appropriate cases, and the Office of the Chief Information Officer has provided assistance on occasion when transactions implicate communications systems. In addition, the Department carefully considers threat assessments provided to CFIUS by the United States intelligence community, of which the FBI is a contributing member, and assessments of national security vulnerabilities provided by CFIUS agencies and others with relevant expertise. By bringing all of these diverse resources to bear, the Department of Justice has maximized its ability to participate in the effective implementation of Exon-Florio.

When warranted by a particular transaction, the Department of Justice carefully considers the possibility of resolving national security concerns associated with the transaction through an agreement with the parties. The Department of Justice, in partnership with other CFIUS agencies, has played an active role in developing, negotiating, and implementing many such agreements. These agreements are typically the result of negotiations between the companies involved in the transaction and those CFIUS member agencies whose specific responsibilities are implicated. In addition to the Department of Justice, the Departments of Homeland Security and Defense often are parties to these agreements. The agreements vary in scope and purpose,

depending on the facts of a particular transaction, and are negotiated on a case-by-case basis to meet the particular national security risks at issue.

Throughout the CFIUS process, the Department works closely with the other CFIUS agencies, each of which brings to the table critical expertise that is needed to make informed decisions regarding each transaction and, where necessary, to make recommendations to the President as contemplated by Exon-Florio. The national security issues associated with a given transaction can be quite complex and can consume significant time and resources, not only within the Department of Justice but also within other CFIUS agencies and the United States intelligence community. However, the Department strongly believes that, through its implementation of Exon-Florio, CFIUS has acted to protect national security.

III. CONCLUSION

In conclusion, I again would like to thank you, Mr. Chairman, and the Committee for your interest in ensuring that Exon-Florio is as effective as possible and for giving me the opportunity to explain the Department of Justice's role with respect to this important national security safeguard. The Department welcomes the focus being brought by this Subcommittee to the CFIUS process and to potential improvements in Exon-Florio, as indicated by Assistant Secretary Lowery's statement which we endorse. The Department looks forward to further dialog with the Congress as this process moves forward.

Thank you, and I am happy to answer any questions you may have.

TESTIMONY OF THE DEPARTMENT OF DEFENSE
BEFORE THE HOUSE FINANCIAL SERVICES COMMITTEE
REGARDING DOD CFIUS PROCESS IMPROVEMENTS

ASSISTANT SECRETARY OF DEFENSE (INTERNATIONAL SECURITY POLICY)

PETER C.W. FLORY

MAY 17, 2006

Madam Chairman, Members of the Committee:

Thank you for the opportunity to appear before you today. Assistant Secretary Lowery has laid out the principles that will guide our consideration of CFIUS reform. I will like to briefly discuss the Department of Defense's role as a member of the Committee on Foreign Investment in the United States (CFIUS), as well as some process improvements we have initiated within the Department.

As a statutory member of the CFIUS, the Department of Defense weighs a number of factors when it considers a proposed foreign acquisition of a US company.

First and foremost, our objective in this process is to ensure that the proposed transaction does not pose risks to US national security interests. To do this, the Department of Defense reviews several aspects of the transaction, including:

The importance of the firm to the US defense industrial base (e.g., is it a sole-source supplier, and, if so, what security and financial costs would be incurred in finding and /or qualifying a new supplier, if required?);

Does the firm to be acquired possess state-of-the art or other militarily critical technologies?

Is the company to be acquired part of the critical infrastructure that the Defense Department depends upon to accomplish its mission?

Is the acquiring company involved in the proliferation of sensitive technology or weapons of mass destruction and their delivery systems?

Can any potential national security concerns posed by the transaction be eliminated by the application of risk mitigation measures, either under the Department's own regulations or through negotiation with the parties?

Recently, after reviewing our procedures for handling CFIUS cases, the Department of Defense implemented several improvements to our internal process for reviewing and determining our positions on CFIUS transactions. These improvements have focused on several areas. The Department ensures an enhanced visibility and transparency of the CFIUS process at the senior leadership level as well as within the leading management of each reviewing organization. For example, the Deputy Secretary of Defense receives briefings on pending CFIUS cases and has been actively involved in decisions involving investigations and security agreements. The Department has also added the Assistant Secretary for Homeland Defense and the Chairman of the Joint Chiefs of Staff to our list of CFIUS case reviewers.

As required, the Department brings in additional DoD organizations and experts to augment the standard DoD review organizations. The Defense Technology Security Administration, which coordinates the overall DoD response, works to flag issues for

other DoD review organizations to help focus their analysis. Given the increased awareness throughout the senior leadership in the Department, our reviewing organizations develop clear, well documented positions, including identification of mitigation measures required to offset risks identified during the review.

To continue strengthening the Department's internal CFIUS process, we are clarifying the authorities and detailing the responsibilities of the Department's CFIUS reviewing organizations in a DoD instruction. Given the size of our Department and the number of reviewing organizations, I believe that this effort will be helpful in ensuring we are allocating personnel with the appropriate programmatic, technical, operational, and regional expertise to the review of these transactions.

The Department is also actively working with other CFIUS member agencies to develop and implement several improvements in the interagency review process. An important development is the increased frequency of interactions at all levels among the CFIUS committee members.

The Department of Defense believes that the CFIUS process is working effectively to balance the need for foreign investment in the United States, while protecting our national security. Madame Chair, this concludes my formal statement. I would be happy to answer any further questions you may have.

Testimony of Douglas Holtz-Eakin
Director, Maurice R. Greenberg Center for Geoeconomic Studies
Paul A.Volcker Chair in International Economics
Council on Foreign Relations

before

Subcommittee on Domestic and International Monetary Policy, Trade, and Technology
Committee on Financial Services
U.S. House of Representatives
May 17, 2006

Chairwoman Pryce, Vice Chairwoman Biggert, and Ranking Member Maloney, thank you for the opportunity to participate in this hearing on H.R. 5337, the "Reform of National Security Reviews of Foreign Direct Investments Act." H.R. 5337 would establish in statute the Committee on Foreign Investment in the United States and establish procedures "to ensure national security while promoting foreign investment." In my remarks, I want to make clear that I am speaking for myself; the Council on Foreign Relations is a non-partisan think tank that does not take positions on issues.

Among developed economies, the United States has performed uniquely well in the past decade. The key characteristic of this outstanding growth has been a post-1995 acceleration in United States productivity – that summary measure indicates the ability of an economy to produce the same goods more cheaply, generate a greater standard of living than in the past from the same people, factories, and equipment, and to use innovation to produce different and higher-quality goods than in the past. In short, productivity is the single-best summary measure of the overall long-term performance of an economy and the United States stands out in recent years.

One ingredient in this recipe for success has been openness to global trade in goods, services, and capital. There is a growing body of economic research that documents the beneficial dynamics of open trade. For example, those firms that are engaged in global markets are more productive than their domestically-oriented counterparts.

A vivid example of the dynamic benefits of open trade is in information technology hardware. As I noted, it is now widely recognized that the United States experienced a surge in productivity growth after 1995 (and perhaps again recently). A substantial factor was the increasing sophistication of IT hardware. One version of this story credits clever engineers in the selfless pursuit of Moore's law. But it is also the case that IT hardware is among the most global and competitive industries, and global markets reward entrepreneurial zeal as much as engineering skills. Moreover, policy supported these dynamics. The Declaration on Trade in Information Technology Products (ITA) from the 1996 Singapore Ministerial Conference was the foundation for reduced barriers to trade in IT hardware.

A related strength of the United States is its sophisticated, deep, and specialized financial markets. Financial markets are the central nervous system of a market economy, serving to collect and transmit important information, guide capital to its most productive use, and enhance the overall coordination of firms, households, and governments.

One particular aspect of executing these functions is financing mergers and acquisitions (M&A). These transactions generate economic value. The bids by new owners raise the overall return to existing shareholders, generating additional capital market funds. At the same time, new ownership can bid more as a result of replacing ineffective management, taking advantage of beneficial complementarities ("synergies") with their existing business model, or otherwise raising the productivity of the purchased firms' capital, technologies, and labor skills. In short, the new firm is more productive than the old – in this way, mergers and acquisitions are one manifestation of the role of competitive financial markets in efficiently allocating national capital.

As capital markets have become global in scope, so has M&A (along with "greenfield" investments by U.S. firms abroad and overseas investors in the United States). Currently, U.S. subsidiaries of companies based outside the United States have over 5 million employees and pay compensation of over $300 billion each year, or about $60,000 per employee. The vast bulk of these investments have come from countries belonging to the Organization for Economic Cooperation and Development (OECD, over 90 percent) and a small minority is undertaken by firms with government control.

In short, a strong economy is part of national security and open, global capital markets are a cornerstone of our strong economic future. Nevertheless, despite the fact that few cross-border transactions show risk of affecting security directly and few are undertaken by firms with government control, those situations do arise (and have arisen) in which strategic, safety considerations overwhelm the financial desirability of a particular transaction. Thus, to meet overall objectives, it is essential to pair policies that support well-functioning, open capital markets with specific carve-outs for transactions that pose a strategic threat.

A policy mechanism to accomplish this aim should embody several characteristics. First, the process would be a targeted mechanism to identify those transactions that generate a legitimate national security concern without excessive and wasteful scrutiny of routine transactions.

Second, the process would be predictable. That is, it would be transparent to market participants *which* transactions would merit scrutiny and review and *how* the strategic impact of the transaction would be evaluated. Ensuring that markets can anticipate which transactions will raise concerns suggests an advantage to avoiding a definition of national security that is either overly broad or indistinct. For example, the definition of "critical infrastructure" embodied on homeland security objectives could potentially include all transactions in the food supply chain. Similarly, definitions that include "economic security" are too broad and likely to generate uncertainty regarding investments.

Seeking to clarify CFIUS evaluation includes not only laying out the steps for review and investigation, but also continuing to build expertise and continuity of staff in this important area.

Third, the process would provide a high degree of confidentiality to secure proprietary business information and national security considerations.

Fourth, the process should be flexible, providing arrangements that permit means to augment security or otherwise satisfy these criteria as part of the transaction itself.

As the Congress considers revisions to the CFIUS process, it is important to recognize that the current system has served the United States very well. To date, CFIUS has to a great extent simultaneously supported national security and overall economic growth. Thus, there would appear to be little merit in a wholesale rethinking of the CFIUS process. Viewed from the perspectives of the characteristics outlined above, H.R. 5337 would have some desirable features.

Perhaps most significantly, it would clarify the "rules of the road" by making clear that if a transaction involves a foreign-government controlled firm, the transaction must be subjected to the investigation process. In addition, an investigation period may be extended by two-thirds vote of CFIUS, requires the signature of the Chair and Vice-Chair on decisions, and provides support for CFIUS by other agencies.

In addition, H.R. 5337 has the potential to build expertise by establishing tracking compliance with mitigation agreements, thereby accumulating deeper knowledge of successful and unsuccessful approaches. Also, the bill directs $10 million to CFIUS in the next few years. This may prove crucial as press reports indicate that the fraction of Treasury time and personnel devoted to the CFIUS process has risen dramatically recently.

H.R. 5337 retains desirable flexibility by permitting CFIUS to negotiate mitigation agreements flexibly with firms involved in a covered transaction.

At the same time, congressional consideration of H.R. 5337 and other such legislation raises at least the potential for concern. Over time, administrations of both political parties have helped to establish a global rules-based system for open investment and free trade. This approach has supported U.S. economic success. This success is put at risk if new procedures are unclear, viewed as overly politicized or unnecessarily discriminate against foreign investment. Procedures of this sort would in themselves worsen the favorable investment climate. An even more problematic outcome would occur if other countries chose policies that provided reciprocal discriminatory treatment against U.S. firms.

In this regard, three areas merit attention. First, it is useful to retain a targeted and clear definition of those transactions covered by CFIUS, and to focus on operational control of new technologies or sensitive locations. As noted earlier, definitions that include more

vague references to "economic security" or those that include an overly-inclusive concept of "critical infrastructure" would likely be detrimental.

Second, it is useful to keep review and investigation times to the minimum necessary to determine the evidence of a genuine national security threat.

Third, it is important to avoid introducing overt political considerations into the process. Indeed, a threshold consideration is the degree to which it is desirable to legislate aspects of the policy at all. CFIUS has been successful in part because it was appropriately an administrative procedure. The greater the extent of legislated review, report, or decision-making, the greater the possibility of detrimental consequences. H.R. 5337 contains detailed reporting requirements on both specific covered transactions and CFIUS reviews in general. While in themselves not troubling, a further extension of these provisions raises concerns over politicization and confidentiality.

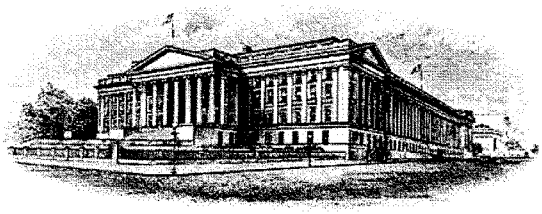
Conclusion

Madame Chairwoman, as CFIUS reform is considered by Congress, it is important to recognize that it is possible to provide open global markets, strong economic growth, and national security. For the most part, these go hand in hand. For example, the Congressional Budget Office projects that over the next decade and one-half, current defense plans will require spending an average of $500 billion (adjusted for inflation), a peak increase of roughly 20 percent over current levels (adjusted for inflation) and above the peak of Cold War spending. Despite this rise, these plans would result in defense spending constituting less than 2.5 percent of Gross Domestic Product, well below the postwar peak of 9.5 percent in 1968.[1] A key aspect of national security is an economy that grows strongly enough to continue to meet the resource demands in the private sector, social objectives, and our military and other national security needs.

In those narrow areas where potential tradeoffs between economic growth and national security arise, a transparent, targeted, disciplined and confidential process to augment economic transactions with security dimensions will serve the United States well.

Thank you for the opportunity to appear before the Subcommittee. I look forward to your questions.

[1] See *The Long-Term Implications of Current Defense Plans and Alternatives: Summary Update for Fiscal Year 2006*, Congressional Budget Office, 2005.



U.S. TREASURY DEPARTMENT OFFICE OF PUBLIC AFFAIRS

EMBARGOED UNTIL 2 P.M. EDT, WEDNESDAY, MAY 17
CONTACT Brookly McLaughlin (202) 622-2920

TESTIMONY OF ASSISTANT SECRETARY FOR INTERNATIONAL AFFAIRS CLAY LOWERY BEFORE THE HOUSE FINANCIAL SERVICES SUBCOMMITTEE ON DOMESTIC AND INTERNATIONAL MONETARY POLICY, TRADE AND TECHNOLOGY ON REFORM OF CFIUS

Ms. Chairman, Ranking Member Maloney, and distinguished members of the Financial Services Subcommittee on Domestic and International Monetary Policy, Trade and Technology, I appreciate the opportunity to appear before you today. I am here speaking on behalf of the Administration, the Department of the Treasury, and the Committee on Foreign Investment in the United States ("CFIUS" or the "Committee") to discuss ways to improve the CFIUS process.

Improving the CFIUS Process

We are reviewing the legislation introduced in the Financial Services Committee, as well as other legislation that has been introduced to update the CFIUS process. We do not have a formal Administration position at this time, but I would like to lay out the key principles that will guide us as we work with the Congress to integrate further America's national and homeland security interests. Reforms should address two broad principles: U.S. national security imperatives in the post-9/11 environment and the need to continue welcoming investment in the U.S. and creating good jobs for American workers.

To advance those principles, the Administration supports improving communications with Congress on CFIUS matters. The Administration also welcomes other reforms to the CFIUS process, including those that enhance accountability, preserve the attractiveness of the United States for foreign investment, focus resources on transactions that present national security issues, ensure due consideration of the nature of the acquirer and assets to be acquired, strengthen the role of the intelligence community, and improve CFIUS monitoring of mitigation agreements. The CFIUS process should first and foremost ensure U.S. national security but should not unnecessarily discourage legitimate investment in U.S. businesses that will provide income, innovation, and employment for Americans. In today's testimony, I plan on addressing these reform principles. The Administration looks forward to a dialogue with Congress regarding reforms to the CFIUS process. Let me first provide a paragraph or two on the historical context.

As Deputy Secretary of the Treasury Kimmitt described during his testimony before you on March 1, the Committee examines foreign acquisitions of U.S. companies pursuant to section 721 of the Defense Production Act of 1950. Commonly known as the Exon-Florio Amendment, section 721 gives the President the power to investigate such acquisitions and to suspend or prohibit a transaction if credible evidence leads him to believe that the acquirer might take action that threatens to impair the national security and if, in his judgment, existing laws, other than the International Emergency Economic Powers

Act and the Exon-Florio Amendment, do not provide adequate and appropriate authority for him to protect the national security. After the enactment of the Exon-Florio Amendment, the President delegated certain of his authorities to the Committee. Pursuant to an Executive Order of the President and subsequent Treasury regulations, the Committee receives notices of transactions subject to the Exon-Florio Amendment and conducts thorough interagency reviews and investigations to identify potential national security issues. The President retains the authority to suspend or prohibit transactions.

Improving Communication with Congress

As Deputy Secretary Kimmitt emphasized in his March 1 testimony, it is clear that improvements in the CFIUS process are still required, particularly with respect to communication with Congress and political accountability. The Administration is committed to improving communication with Congress concerning CFIUS matters and shares the view that Congress should receive timely information to help meet its oversight responsibilities. Treasury is now promptly notifying Congress of every review upon its completion, and the Administration is working hard to be responsive to Congressional inquiries. The Administration has also offered to conduct quarterly briefings for Congress on CFIUS matters. These quarterly briefings were scheduled to begin before the issues with respect to the DP World transaction became the subject of Congressional and media attention. The Administration is also actively preparing the 2006 quadrennial report on possible foreign efforts to conduct economic espionage in the United States or acquire critical U.S. technologies. We regret that a quadrennial report has not been prepared since 1994, and the Administration will issue the 2006 report in a timely and thorough manner. I look forward to your suggestions on how to foster better communication.

While reforms of the CFIUS process should advance our shared goal of improved communication, they should also reflect the importance of protecting proprietary information and the integrity of the executive branch's decision-making process. First, reforms to the CFIUS process should encourage companies to file with the Committee by ensuring that proprietary information they provide to the Committee is protected from public disclosure and will not be used for competitive purposes. Full disclosure of information by companies is critical to the Committee's ability to analyze thoroughly the national security risks associated with a transaction. Second, it is important to protect the executive branch's deliberative process and avoid exposure of classified methods and sources as well as possible politicization of CFIUS reviews and investigations for partisan purposes or at the behest of special interests. Third, reporting requirements should take into account the need for CFIUS member agencies to focus their limited resources on examining transactions notified to the Committee. I am confident that the Committee can provide Congress with the information it requires to fulfill its oversight role while respecting these important principles.

Enhancing Accountability

The Administration supports a high level of political accountability for CFIUS decisions and is committed to ensuring that senior, Senate-confirmed officials play an integral role in examining every transaction notified to the Committee. Improvements to the CFIUS process should also ensure that senior U.S. officials are focused on national security issues. I know that CFIUS agencies are now briefing at the highest levels in their respective agencies. However, the President and Cabinet-level officials should focus their attention on the cases that merit the greatest scrutiny. The President should focus on transactions that at least one member of the Committee recommends he suspend or prohibit. Requiring the President to make a determination when all CFIUS members agree that a transaction does not threaten to impair the national security would potentially divert his attention from transactions that could pose security risks.

Similarly, requiring Cabinet-level certification of CFIUS decisions on transactions that do not raise potential national security concerns would lengthen and delay the process, presenting an unnecessary impediment to legitimate investment. Such a requirement would also dilute the resources that the most senior U.S. officials could devote to transactions that do pose national security risks. This would

impede the Committee's ability to protect the national security as effectively as possible. I am confident that the Committee can carry out its obligations in a manner that guarantees high-level political accountability while focusing senior officials on transactions that raise possible national security threats.

Promoting Legitimate Investment in the United States

The Administration also emphasizes the importance of preserving the attractiveness of the United States to overseas investors. The intent of the Exon-Florio Amendment is not to discourage foreign direct investment (FDI) generally, but to provide a mechanism to review and, if the President finds necessary, to restrict investment that threatens the national security. FDI is critical to the U.S. economy. Majority-owned U.S. affiliates of foreign companies employed 5.1 million U.S. workers in 2004. Capital expenditures in 2004 by these affiliates totaled $108 billion and their sales totaled $2,302 billion. In 2003, these affiliates spent $30 billion on R&D and accounted for 21 percent of total U.S. exports. Roughly 40 percent of those jobs were in manufacturing, four times the national average. If foreign companies were to reduce their spending in the U.S. as a result of perceptions that the United States was less welcoming of FDI, lower investment would cost American workers good jobs, reduce innovation, and lower the growth of the U.S. economy.

Reforms to the CFIUS process should send a signal that the United States is serious about national security and welcomes legitimate FDI. The Committee must examine each transaction thoroughly, but the timeframes for examination should not be unnecessarily long. In addition, the process should not require investigation of transactions that could not possibly impair the national security. Last year, the Committee received 65 notices of transactions under the Exon-Florio Amendment. This year, CFIUS filings are on a pace to total roughly 90. Improvements to the CFIUS process should promote filing of notice with respect to appropriate transactions but should not delay or deter FDI with no nexus to the national security. The Committee can best serve U.S. interests through thorough examinations that protect the national security while maintaining the credibility of the U.S. open investment policy for overseas investors and the confidence of U.S. investors abroad that they will not be subject to retaliatory discrimination.

Focusing on Transactions that Raise National Security Issues

The Administration is also committed to maintaining the Committee's appropriate focus on national security. Many transactions notified to the Committee do not raise national security issues, and requiring extended investigations of such transactions would send the wrong message that the United States does not welcome foreign investment. Reforms to the CFIUS process should ensure that members of the Committee focus their resources on transactions that could potentially impair the national security.

Focusing on the Nature of the Acquirer and the Assets to be Acquired

The Exon-Florio Amendment is nearly two decades old, and the Administration supports efforts to update it to reflect the post-9/11 security environment. The Committee should continue to consider a broad range of national security issues when reviewing transactions, and its assessment of threats and vulnerabilities should continue to change as conditions change. Two factors that should always be taken into account in CFIUS assessments are the nature of the acquiring entity and the nature of the assets to be acquired. These are essential in weighing the national security implications of any acquisition. The Administration supports requiring the Committee to consider the ultimate ownership of the acquirer and the possible foreign acquisition of critical infrastructure or other sensitive assets when reviewing any transaction under the Exon-Florio Amendment, both of which are factors the Committee already considers when reviewing transactions.

Mandatory investigations of acquisitions that do not present national security issues would divert critical resources away from examination of acquisitions that do pose potential hazards, however. During the

current Administration, there have been 281 notices filed with the Committee. Nine transactions have been subject to extended 45-day investigations, and two have reached the President for a final determination. Requiring an investigation of every transaction involving a foreign government-owned acquirer or the potential purchase of critical infrastructure assets would result in scores of investigations each year in which no national security concerns are present. This would diminish the Committee's ability to protect the national security.

Strengthening the Role of the Intelligence Community

The Administration also believes that the Committee can carry out its role more effectively by strengthening the role of the intelligence community in the CFIUS process, which is essential in a complex and changing national security environment. The Director of National Intelligence (DNI) has begun to do so by assigning an all-threat assessment responsibility to the National Intelligence Council and ensuring that all relevant intelligence community agencies and activities participate in the development of final intelligence assessments provided to the Committee. The Committee recently formalized the role of the Office of the DNI, which plays a key role in all CFIUS reviews and investigations by participating in CFIUS meetings, examining every transaction notified to the Committee, and providing broad and comprehensive threat assessments. The DNI already contributed greatly to the CFIUS process through reports by the Intelligence Community Acquisition Risk Center concerning transactions notified to the Committee, but formalizing its place in the process—and strengthening the threat assessments provided to the Committee—represent an enhancement of the intelligence community's role. The DNI does not vote on CFIUS matters and should not, because the role of the DNI is to provide intelligence support and not to make policy judgments based upon that intelligence.

Improving the Monitoring of Mitigation Agreements

A further key to improving the CFIUS process is to strengthen the monitoring of mitigation agreements entered into between entities filing notice under the Exon-Florio amendment and members of the Committee. Typically, the members of the Committee with the greatest relevant expertise assume the lead role in examining any national security issues related to a transaction and, when appropriate, developing appropriate mechanisms to address those risks. Mitigation agreements implement security measures that vary in scope and purpose according to the particular national security concerns raised by a specific transaction. Monitoring parties' adherence to mitigation agreements after the conclusion of the CFIUS process is an important part of protecting the national security. The Administration supports reforms that reinforce the authority and provide resources for agencies that negotiate mitigation agreements to improve existing enforcement practices.

Conclusion

Madame Chair, the Administration already has taken a number of steps to improve the CFIUS process and to address concerns raised by Congress. I would like to reiterate in closing that the Administration supports reforms to the CFIUS process, including those I have discussed, and will continue to work with Congress toward that end. Sound legislation can ensure that the Committee reviews transactions thoroughly, protects the national security, conducts its affairs in an accountable manner, and avoids creating undue barriers to foreign investment in the United States. All members of CFIUS are committed to working with Congress to improve the process, understanding that their top priority is to protect our national security.

I thank you for your time today and am happy to answer to any questions.

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TESTIMONY OF

DAVID MARCHICK[1]

BEFORE THE HOUSE FINANCIAL SERVICES COMMITTEE SUBCOMMITTEE ON DOMESTIC AND INTERNATIONAL MONETARY POLICY, TRADE AND TECHNOLOGY

ON H.R. 5337, THE REFORM OF NATIONAL SECURITY REVIEWS AND FOREIGN DIRECT INVESTMENT ACT

May 17, 2006

Chairman Pryce, Ranking Member Maloney and Members of the Committee:

Thank you for the opportunity to testify today. It is a privilege to appear before you.

I would like to applaud your leadership, Madame Chairman, and that of Ranking Member Maloney, Chairman Oxley, Ranking Member Frank, Representative Crowley, and many other members of this Committee for the careful, deliberate, considered process you undertook to develop this bipartisan legislation. You held multiple hearings. You took testimony from a variety of witnesses and distinct perspectives. Your staff held multiple briefing sessions and studied the issues. And all of this took place in a very heated political environment in an election year. Because of your leadership, I believe that the Committee is now considering a tough, effective bill that will restore Congress's confidence in CFIUS, enhance protection of national security and maintain the United States' longstanding open investment policy.

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[1] Partner at Covington & Burling and co-author of "U.S. National Security and Foreign Direct Investment," (Institute for International Economics, May 2006). I have and continue to represent a variety of U.S. and foreign companies before CFIUS.

Comments on the Blunt/Pryce/Maloney/Crowley Bill

In my view, the most important principle that should guide Exon-Florio reform is to ensure that CFIUS has all of the tools and all of the time needed to scrutinize, dissect and act on the cases that present real national security issues, while allowing the cases that do not raise real national security issues to proceed through CFIUS in the initial 30-day period. Ensuring that transactions that don't raise national security issues can obtain Exon-Florio approval in 30 days is essential to avoid discriminatory treatment of foreign investors that would chill the investment our economy needs. As I mentioned during the Committee's March hearing, American companies that make acquisitions need to secure antitrust approval under the Hart-Scott-Rodino Act, which also has an initial 30-day review period. Preserving two 30-day, parallel regulatory processes for both domestic and foreign acquisitions of U.S. companies ensures that foreign bids for U.S. companies are not discounted or ignored because of longer regulatory timeframes.

With a few tweaks, I believe the bill currently before the Committee will enhance U.S. national security while maintaining an open investment environment. Specifically, the bill requires CFIUS to consider additional factors during the review and investigation process, including whether a transaction has a security-related impact on critical infrastructure. While I would prefer to maintain the existing time periods, it is much preferable to add additional time to the end of the investigation period, as the bill does, rather than extending the process after the initial 30-day period. It ensures that CFIUS will have the information it needs by giving the Committee greater investigatory authority. It defines the appropriate role of the intelligence agencies as an information resource, as opposed to a policy role. It enhances accountability for both CFIUS and the transacting parties by requiring certification of notices, reports, and decisions, and by establishing procedures for control and continued monitoring of withdrawn transactions. It maintains Treasury's leadership of the Committee and clarifies the security agencies' role in leading and enforcing security agreements. The bill maintains voluntary, as opposed to mandatory, notices. And the bill enhances transparency of the process by requiring CFIUS to collect and share more data, on an aggregate basis, through semi-

annual reports to Congress, without creating burdensome notice and reporting requirements that will politicize the process or risk leakage of business proprietary data. These provisions represent important substantive and procedural improvements to the CFIUS process.

I do, however, have several concerns with specific provisions of the bill in its current form.

First, I completely understand the dynamics that led the Committee to tighten the so-called "Byrd Amendment" for government-owned companies, particularly in the wake of the Dubai Ports Controversy. In my view, acquisitions by some government-owned companies raise unique national security issues and should receive scrutiny. U.S. companies are put at a competitive disadvantage against those government-owned companies that receive subsidized or concessional government financing. But not all government acquisitions create the same national security risk, and CFIUS should have discretion to distinguish between transactions that raise issues and those that don't. The British government currently owns Westinghouse, the nuclear company, and the Venezuelan government currently owns CITGO. If each of those acquisitions were to be made today, they obviously would and should be treated differently given the unparalleled relationship we have with the UK and the difficult relationship we have with Venezuela. I think it would be useful for the Committee to clarify the intent of the legislation, perhaps in its report, that CFIUS can allow acquisitions by government-owned companies to go straight to the investigation stage and that CFIUS has discretion to close the investigation if no real issues exist or if any national security concerns have been mitigated.

Second, I also understand the Committee's desire for additional accountability. But the requirement that the Secretaries or Deputy Secretaries of both the Treasury and Homeland Security personally approve and sign each and every review and investigation may create bureaucratic delays and impede CFIUS's ability to efficiently implement Exon-Florio. Perhaps the Committee could explore ways to require the high-level sign-

off for transactions that raise real national security issues, while allowing an Undersecretary or Assistant Secretary to approve other transactions.

Third, CFIUS should never act if the Director of National Intelligence does not have adequate time to collect and analyze intelligence relating to a particular transaction. But again, the policy underpinning CFIUS reform should be to create a process that is tough enough for the complex cases and flexible enough for the easy cases. Some intelligence reviews might take 30, 45 or even 60 days. Reviews of companies that frequently go through the CFIUS process could simply be updated in a matter of days. But by creating a 30-day minimum for intelligence reviews, and requiring that the reviews be completed no less than 7 days before the end of the initial review period, the bill establishes a *de facto* 37 day process, even for transactions that raise no national security issues. I am confident that a provision can be fashioned to allow the DNI to do its job well without slowing down the entire process with a requirement for extended analysis of cases that present no national security concerns.

The Impact of Congressional Scrutiny on CFIUS

Allow me to offer a few thoughts about the impact of post-DPW Congressional scrutiny on the CFIUS process. Without question, there needs to be additional Congressional oversight of and transparency into the CFIUS process. But overly-invasive scrutiny may result in regulatory hyper-caution, or even paralysis in the process. There are already some indications of this phenomenon in both the agencies and the way the private sector has responded. In this environment, no agency official, whether a career professional or political appointee, wants to be the person to sign off on the next transaction that creates a Dubai Ports World-like controversy. With additional scrutiny from Congress, including requests for documents from the DPW case, career officials in the CFIUS agencies will be even more cautious. Careful scrutiny is important because the stakes are so high. But with a hyper-conservative bureaucracy there is real danger that deals that should be approved are rejected, or unnecessary and burdensome conditions are imposed on companies simply to provide "cover" to the bureaucracy. For example, this year alone

there have already been three investigations. In each of the last three years, CFIUS conducted two investigations each year. The easiest decision for a bureaucracy to not make a decision, creating delays and uncertainty for foreign investors.

The private sector has already begun responding to this more cautious regulatory environment by filing many, many more cases. CFIUS has already received 32 filings this year and at this pace could receive 85 filings this year, a 31% increase. With the attractiveness of the U.S. economy and a falling dollar, CFIUS could see a dramatic increase in filings this year.

On top of this, the Senate bill contains a provision that creates a *de facto* presumption that all foreign investments in critical infrastructure present a national security risk. A few numbers will illustrate the danger of regulatory rigor mortis: since President Bush went into office, there have been 285 filings. Ten of these proceeded to an investigation. But 52 of these transactions involved a foreign-controlled corporation. Under either the House or Senate bills, there would have been a minimum of 52 investigations. In my own practice, every single transaction I have handled in the past three years falls in DHS's definition of critical infrastructure. Even if my practice over represents foreign investments in critical infrastructure, one could imagine a scenario in which up to 60% of all future filings would require a full investigation.

I am all for tough scrutiny of foreign investments in order to protect national security, but I am very concerned that the combined impact of a growth in filings, an overly cautious bureaucracy and a requirement that all government-controlled transactions proceed to investigation will completely overwhelm CFIUS's ability to conduct an efficient process. CFIUS needs the flexibility to focus on the cases that raise real concerns and dispose of those that don't. Requiring CFIUS to spend scarce time and resources on insignificant cases compromises the agencies' ability to protect national security by focusing on the cases that matter.

One final thought: the irony of the entire DPW controversy is that the perception exists that the initial 30-day review period is cursory and that transactions that don't proceed to an investigation aren't heavily scrutinized. Nothing could be further from the truth. Most of the substantive national security work gets done either during or before the initial 30-day review period by highly professional, tough national security experts. One good idea that has been raised would be to call the initial 30-day period the "investigation" and the subsequent period an "extended" or "supplemental" investigation. It is critical that Congress does not view reviews that last only the initial 30 days as anything less than rigorous.

Protection of Critical Infrastructure

The final subject I would like to address is protection of "critical infrastructure." This has become a significant issue in the debate over CFIUS reform and will continue to be an important subject as you prepare for conference committee work with the Senate Banking Committee. Protection of critical infrastructure is a new and evolving concept, and therefore CFIUS should be given the flexibility to spend its scarce time and resources to focus on those acquisitions that create real national security risks. Forcing CFIUS to scrutinize every foreign investment in critical infrastructure will compromise CFIUS's ability to focus on the transactions that matter from a national security perspective. Three different approaches have been proposed with respect to the protection of "critical infrastructure."

- H.R. 4881, offered by Chairman Hunter and other Members, would essentially prohibit foreign investment in critical infrastructure unless the particular investment is put in a "US Trust" run by American citizens and walled off from the foreign parent. If the Department of Homeland Security's (DHS) current list of "critical infrastructure" activities were used, close to 25 percent of the U.S. economy would be off limits to foreign investment under this proposal.
- The Senate bill, offered by Chairman Shelby and Senator Sarbanes, requires that foreign investments in critical infrastructure go to the "investigation" stage unless CFIUS determines that "any possible impairment to national security has been mitigated by additional assurances during" the review period. This approach creates a de facto presumption that all foreign investment in critical infrastructure creates a

security risk because it must go to an "investigation" unless the risk is mitigated. In my view, some investments in critical infrastructure do create real national security risks; other investments should not even be filed with CFIUS because they create no risk whatsoever.

- Your bill, Madame Chairman, requires CFIUS to consider whether a "covered transaction has a national security-related impact on critical infrastructure in the United States" as a factor in its deliberations. I think you have it right. It should be a factor CFIUS should consider. How significant a factor it should be will vary on a case-by-case basis.

One of the reasons that your approach makes sense is because the concept of protection of critical infrastructure is a relatively new and evolving security objective. Unlike in the area of foreign investments in the defense sector, an area in which DOD has well established regulations and security protocols, established policies and doctrines have not been developed for protection of critical infrastructure. Additional work needs to be done, in my view, to define what exactly is meant by critical infrastructure. For example, the Patriot Act defines "critical infrastructure" to be

> ""[S]ystems and assets, whether physical or virtual, so vital to the United States that the incapacity or destruction of such systems and assets would have a debilitating impact on security, national economic security, national public health or safety, or any combination of those matters."[2]

This definition creates a high threshold and a relatively narrow list of assets that would "have a debilitating effect" on security. By contrast, the Department of Homeland Security has identified 12 extremely broad sectors that it considers to be critical infrastructure, including agriculture and food, water, public health, emergency services, the defense industry, telecommunications, energy, transportation, banking and finance, chemicals, postal services and shipping, and information technology.[3] This definition may work for *physical* protection of critical infrastructure; it does not work for foreign investment considerations.

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[2] Section 1016(e) of the Patriot Act, codified at 42 U.S.C. 5195c.

[3] See National Strategy for the Physical Protection of Critical Infrastructure and Key Assets, (February 2003), available at www.whitehouse.gov (accessed March 13, 2006); and HSPD-7 (December 2003), available at www.whitehouse.gov (accessed March 14, 2006).

But beyond specifying these sectors, the Department of Homeland Security has not identified the types of companies, or even subsectors, for which acquisition by a foreign firm would be deemed a high risk to national security. Nor has anyone explained why foreign ownership of these sectors would de facto create a national security risk. Thirty percent of value added in the U.S. chemical sector is already produced by U.S. affiliates of foreign owned firms. In the energy sector, it would seem fairly clear that foreign acquisitions of US nuclear energy companies should be reviewed by CFIUS. What about foreign acquisitions of US firms operating in other segments of the energy sector? Many foreign companies own electric distribution companies. Do these raise national security issues? What about foreign ownership of a wind farm? Similar questions certainly apply in the other sectors, including the food, transportation (including ports), and financial sectors, where foreign ownership of US firms is common.

In my view, the Administration and Congress should work together to determine how best to protect critical infrastructure, regardless of who owns a particular company. Security policies and guidance could be developed on a sector-by-sector basis. A baseline level of security requirements should be established. If there are particular national security issues associated with foreign ownership in a particular asset, CFIUS is well equipped to mitigate that risk - or block the investment.

In sum, until policies and doctrines with respect to critical infrastructure have been further developed, it is both dangerous and unnecessary to do anything beyond adding "critical infrastructure" as a factor that CFIUS should consider. Creating an outright ban on foreign investment in "critical infrastructure" would both harm job creation and undermine national security, because foreign investment in these sectors has both increased research and development and spurred additional competition and innovation. Further, it would be unwise to create a presumption that foreign investment in critical infrastructure creates a national security risk. Rather, CFIUS should be given the discretion to deal with these issues on a case-by-case basis, examining both the trustworthiness of the acquirer and the sensitivity of the asset being acquired.

Conclusion

Let me close by applauding the work of the Committee, as well as the way you conducted that work. This has been as deliberate and bipartisan a process as I have seen in my 15 years in Washington. I am grateful for the opportunity to testify and look forward to working with you as you deliberate on this important subject.

TESTIMONY OF
JOHN K. VERONEAU
BEFORE THE
HOUSE FINANCIAL SERVICES COMMITTEE
SUBCOMMITTEE ON DOMESTIC AND INTERNATIONAL MONETARY POLICY, TRADE AND TECHNOLOGY
ON
"H.R. 5337 REFORM OF NATIONAL SECURITY REVIEWS AND FOREIGN DIRECT INVESTMENT ACT"

May 17, 2006

Chairwoman Pryce, Ranking Member Maloney and other Members of the Committee, I appreciate the opportunity to testify before you today. I am a partner in the law firm of DLA Piper Rudnick Gray Cary. From 2003-05, I served as the General Counsel in the Office of the United States Trade Representative (USTR) and represented the Office on the Committee for Foreign Investment in the United States (CFIUS).

Based on this experience, I am pleased to testify on how I believe H.R. 5337, Reform of National Security Reviews of Foreign Direct Investments Act, could impact the twin goals of protecting national security and promoting investment in the United States. These comments also represent the views of the Business Roundtable, the Organization for International Investment, the Financial Services Forum, and the United States Chamber of Commerce.

First and foremost, we appreciate the deliberative and bipartisan manner in which this legislation has been developed.

The bill takes several important steps to protect against foreign acquisitions that might threaten national security.

It creates a clear statutory role for the Director of National Intelligence to review proposed acquisitions.

It provides for the ability to extend the investigation period if security issues are not resolved.

It provides authority for CFIUS to reconsider previously approved transactions if security agreements are seriously breached.

And, it requires acquisitions by foreign state-owned entities to undergo the 45-day investigation period.

We support strong measures to assure that national security interests are protected. Some provisions in the bill, however, add regulatory burdens that serve no national security interest. These burdens have the potential to discourage investment in the United States while providing no offsetting national security benefit.

As the events of September 11, 2001 painfully demonstrated, threats to our national and homeland security can lie in the most unlikely of places. We need systems to effectively identify, mitigate and counter these security threats.

A potential source of risk stems from the foreign acquisition of U.S. companies. While it is wrong to presume that foreign ownership is inherently a security threat, it is reasonable for the government to undertake an analysis of whether such risks exist.

No president should ever hesitate to block an acquisition that truly threatens national security. But, it is important that the process by which such risks are considered does not hamper legitimate foreign investment.

Since its creation in 1975, CFIUS has been the inter-agency committee charged with determining the national security risks, if any, associated with foreign acquisitions.

In recent months, it has become clear that confidence in the CFIUS process has waned and that legislation is needed to make substantive changes that will enhance confidence. While I believe CFIUS has adapted itself to the post-9/11 threat environment and for the most part has worked well, I understand the need to make changes to restore public confidence in CFIUS and appreciate the intent of H.R. 5337 in serving this goal.

In legislating on CFIUS, it is important that we not lose sight of four key factors:

First, national security is paramount, but it relies heavily on economic security. All prudent steps must be taken to reduce risk. But regulatory systems that overreach by imposing burdens that serve no national security benefit undermine U.S. economic competitiveness.

Second, it is important for CFIUS to focus on the risks *created by the acquisition*. There is a baseline risk associated with the misuse of any U.S. company or asset. The essential question for CFIUS is whether foreign ownership itself creates a new and specific risk. If not, there is no basis to deny the transaction.

Third, the CFIUS process should provide sufficient time to vet thoroughly any security risks associated with a transaction. But it should also provide clarity and certainty for approving transactions that pose no security threat. The vast majority of CFIUS filings are -- and can be -- processed within the initial 30-day review period.

It is important that non-controversial acquisitions be approved on the same 30-day timeline as the Hart-Scott-Rodino regulatory process for antitrust reviews. Otherwise, foreign investors would be unfairly discriminated against and U.S. asset owners would be denied the opportunity to get the best price for their assets.

Great care has been taken over the years to allow CFIUS to meet its national security mission without having a chilling effect on legitimate foreign investment. Having a common timeline for both CFIUS and Hart-Scott-Rodino has been an essential element in achieving this goal. Losing this common timeline would discourage foreign investment and serve no security benefit.

Acquisitions that raise security concerns still unresolved at the end of the 30-day review period can be further vetted in the 45-day investigation period. As such, preserving the 30-day limit on non-controversial filings need not compromise CFIUS' primary goal of protecting national security.

Fourth, CFIUS should not become politicized. Foreign direct investment in the United States is important for job creation and economic development. We should encourage rather than discourage such investment. Efforts to unfairly restrict investment at home will also hurt American interests abroad. The United States – through pension funds and other vehicles -- is the largest foreign investor in the world and has the most to lose if protectionist forces overtake investment policy.

On balance, these factors were considered in drafting H.R. 5337. The legislation strengthens CFIUS' focus on national security without causing the process to get side-tracked on matters unrelated to security.

In particular, the bill preserves CFIUS' ability to dispose of filings within 30 days if there are no outstanding security matters. This will allow investors to make decisions with confidence that the regulatory process will not become bogged down on non-security matters. More importantly, it will allow CFIUS to focus on the minority of cases that have unresolved security issues at the end of the 30-day review period.

Unfortunately, the bill's preservation of the 30-day review period could be undermined by the requirement that the Director of National Intelligence (DNI) have no less than 30 days to complete its security assessment. The DNI should certainly have sufficient time to complete its work but, in cases where the analysis can be done in less than 30 days, it should be allowed. There is no security benefit in preventing the DNI from completing its work as quickly as the facts and circumstances of a case allow.

Mandating that certain classes of acquisitions must go to the 45-day investigation phase is dangerous because it will force CFIUS at times to spend additional resources on matters where there are no outstanding security matters. Such mandates detract from CFIUS' proper focus on transactions that threaten national security.

We understand the committee's desire to insist that acquisitions by foreign state-owned companies be subject automatically to the 45-day investigation. However, we encourage the Committee to distinguish companies wholly owned and controlled by a foreign government from those where the foreign government is simply a minority investor. If no security threat exists, CFIUS should have the flexibility to approve transactions as quickly as possible, notwithstanding some foreign government ownership.

Finally, we recognize the desire in Congress to impose a statutory requirement to notify relevant committees of CFIUS filings. Extensive and detailed reporting on individual CFIUS filings invites a politicization of the process and risks the disclosure of highly sensitive proprietary information. We encourage the committee to use great caution in imposing notice and reporting requirements, as they can divert scarce CFIUS resources away from their national security focus.

The Department of the Treasury has already taken steps to address concerns with investigations of foreign state-owned companies and to coordinate more closely with the Congress on CFIUS filings. These are important steps in rebuilding confidence in the CFIUS process.

To the extent that Congress believes that statutory changes are necessary to codify these changes and rebuild confidence, H.R. 5337 achieves this goal. It codifies a process to identify and respond to security threats posed by acquisitions while recognizing the economic benefits of foreign direct investment.

John K. Veroneau

Mr. Veroneau joined the law firm of DLA Piper Rudnick Gray Cary in 2005 after serving as General Counsel in the Office of the United States Trade Representative (USTR), the lead federal agency for trade law, policy and enforcement. Mr. Veroneau also served as an Assistant Secretary of Defense and held several senior staff positions in the United States Senate.

From 1989-1997, Mr. Veroneau worked in the United States Senate, serving as Legislative Director to U.S. Senator William S. Cohen (Maine). Legislative Director to now U.S. Majority Leader Bill Frist (Tennessee) and Chief of Staff to U.S. Senator M. Susan Collins (Maine).

From 1997-2001, Mr. Veroneau served under then Secretary of Defense William S. Cohen. In 1999, he was nominated by President Clinton and confirmed by the U.S. Senate to be the Assistant Secretary of Defense for Legislative Affairs.

In 2001, Mr. Veroneau joined the Bush Administration as the Assistant U.S. Trade Representative for Congressional Affairs. In 2003, he was appointed General Counsel at USTR and served as USTR's representative to the Committee on Foreign Investment in the United States.

Education

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